LIBRARY
SUPREME COURT, U. S.

FILED
OCT 4 1974
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74-376

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

BERNARD F. ASHE,
Attorney for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205

JAMES R. SANDNER,
ROCCO A. SOLIMANDO,
Of Counsel,
80 Wolf Road,
Albany, N. Y. 12205

Table of Contents.

Page

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department 1

Opinions Below 2

Jurisdiction 3

Questions Presented 3

Constitutional and Statutory Provisions Involved 4

Statement of the Case 4

A. Background 4

B. Proceedings in the Supreme Court, Appellate Division, Third Department 9

C. Proceedings in the New York State Court of Appeals 11

Reasons for Granting the Writ 13

I. The *ex parte* Temporary Restraining Order of October 11, 1972, issued by Supreme Court, Broome County, State of New York, was and is constitutionally void in that it is overly broad and violates the constitutional rights of the petitioners as guaranteed by the First and Fourteenth Amendments to the United States Constitution and the Appellate Division's decision that petitioners' constitutional contentions were without any substantial merit is not in accord with applicable decisions of this Court 13

Page

II. The order of Supreme Court, Broome County, State of New York, dated October 19, 1972, granting a preliminary injunction is constitutionally void insofar as it fringes upon, interferes with and denies petitioners' First Amendment rights protected by the United States Constitution, and the decision of the Appellate Division, Third Department, that petitioners' contentions in this regard were without any substantial merit is not in accord with applicable decisions of this Court 23

Conclusion 29

APPENDIX:

Appendix A—Order of Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal 30

Appendix B—Decision of the Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal 31

Appendix C—Order of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals 32

Appendix D—Memorandum Decision of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals 34

Appendix E—Bench Decision of Justice Brink, Supreme Court, Broome County, Printed From the Record, Pages 15, 98-99 35

Page

Appendix F—Order of Supreme Court, Broome County, Dated October 19, 1972 37

Appendix G—Decision, Opinion and Order of the Appellate Division, Third Department, Affirming the Order of Supreme Court, Broome County 41

Appendix H—Constitutional and Statutory Provisions 48

Appendix I—The *ex parte* Order to Show Cause with Temporary Restraining Order Signed by Justice Brink, Supreme Court, Broome County 50

Appendix J—Order to Show Cause to Vacate *ex parte* Order and Temporary Restraining Order and Affidavit of Bernard F. Ashe, Esq., in Support Thereof 53

TABLE OF CASES.

Page

Amalgamated Fruit Employees Union, Local 590, *et al.*, v. Logan Valley Plaza, Inc., *et al.*, 391 U. S. 308 (1968) 18, 27

Aurora Education Association v. Board of Education, 490 F. 2d 431 (7th Cir. 1973) 28

Bell v. Burson, 402 U. S. 525 (1971) 18

Board of Regents v. Roth, 408 U. S. 564 (1972) 18

Boddie v. State of Connecticut, 401 U. S. 371 (1970) 18, 27

Carroll, *et al.*, v. President and Commissioner of Princess Anne, *et al.*, 393 U. S. 175 (1968) 14, 27

City of New York v. DeLury, 23 N. Y. 2d 175, 295 N. Y. S. 2d 901 (1968), *app. dsmd.* 394 U. S. 455 (1969), *reh. den.*, 396 U. S. 872 (1969) 21, 28

Concerned Consumers League v. O'Neil, *et al.*, 371 F. Supp. 644 (D.C. E.D., Wisc. 1974) 22

Cross Company v. United Automobile Aircraft and Agricultural Implement Workers of America, Local 155, AFL-CIO, *et al.*, 123 N. W. 2d 215 (Mich. S. Ct., 1963) 19

Dause, *et al.*, v. Bates, 369 F. Supp. 139 (W.D. Ky. 1973) 18, 27

Groppi v. Leslie, 404 U. S. 496 (1972) 16

Matter of State of New York v. Fuller, 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dept. 1968) 21, 22, 28

Page

Perry v. Sindermann, 408 U. S. 593 (1972) 18

Rankin v. Shanker, 23 N. Y. 2d 111, 295 N. Y. S. 2d 625 (1968) 21, 22, 28

School Committee v. Westerly Teachers Assn., 299 A. 2d 441, 82 LRRM 2567 (Sup. Ct. Rhode Island 1973) 16

Thornhill v. State of Alabama, 310 U. S. 88 (1940) .. 17, 27

STATUTES.

United States Constitution:

First Amendment 3, 4, 6, 10, 12, 13, 19, 21, 22, 23, 24, 28

Fourteenth Amendment ..... 4, ,6, 10, 12, 13, 23, 24

Federal Rules of Civil Procedure:

Rule 65(b) 19, 20

New York Civil Practice Law and Rules:

Section 6313(a) 4

New York Civil Service Law:

Section 210(1) 4, 21, 22, 23, 28

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

The petitioners, Susquehanna Valley Teachers' Association, New York Congress of Teachers, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James C. Trask, pray that a writ of certiorari be issued to review the opinion and judgment of the Supreme Court, Appellate Division, Third Judicial Department, of the State of New York, rendered in these proceedings, the decision having been rendered on January 3, 1974, and the order thereon having been entered on January 22, 1974.

Opinions Below.

The respondent endeavored to commence this proceeding in Special Term, Supreme Court, Broome County, State of New York. The petitioners appealed from all parts of the order of Special Term, except that portion denying respondent's motion for a preliminary injunction against the New York Congress of Teachers, granting a preliminary injunction in favor of the respondent against the petitioners, and denying petitioners' motion to vacate the *ex parte* order to show cause with restraining order, to the Appellate Division, Third Judicial Department, which unanimously affirmed the order of Special Term. Petitioners thereafter moved in both the Appellate Division and the New York Court of Appeals for permission to appeal to the Court of Appeals from the order and decision of the Appellate Division. Both motions were denied.

The order of the Court of Appeals dismissing petitioners' motion for leave to appeal to the Court of Appeals, as yet unreported, appears at Appendix A, *infra*. The decision of the Court of Appeals, also unreported, dismissing petitioners' motion for leave to appeal to the Court of Appeals appears at Appendix B, *infra*. The order of the Appellate Division, Third Department, denying petitioners' motion for leave to appeal to the Court of Appeals, appears at Appendix C, *infra*. The memorandum decision of the Appellate Division, Third Department, denying petitioners' motion for permission to appeal to the Court of Appeals is printed at Appendix D, *infra*. The Supreme Court, Broome County, did not issue a written decision and/or opinion, but the bench decision of Justice Brink appears in the record at page 15 and at pages 98 and 99, and is printed at Appendix E, *infra*. The order of the Supreme Court, Broome County, based upon the aforesaid bench decision appears

at Appendix F, *infra*. The Appellate Division, Third Department, unanimously affirmed the order of Supreme Court, Broome County, in a decision reported in 43 A. D. 2d 198, 350 N. Y. S. 2d 805 (1974), a copy of which along with the order of affirmance appears at Appendix G, *infra*. The order of the Court of Appeals of the State of New York dismissing petitioners' motion for leave to appeal to that court was entered on July 11, 1974 (see Appendix A, *infra*). This petition for certiorari was filed less than 90 days from the date of the entry of the aforesaid order of the New York State Court of Appeals.

Jurisdiction.

The order of the Appellate Division, Third Judicial Department, was entered on January 22, 1974, and the order of the New York State Court of Appeals dismissing petitioners' motion for leave to appeal to that court was entered on July 11, 1974. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U. S. C. 1257(3).

Questions Presented.

1. Whether the *ex parte* temporary restraining order dated October 11, 1972, issued by Supreme Court, Broome County (Brink, J), was constitutionally void since it purported to restrain those subject to it from exercising their First Amendment rights, and was issued without notice to those affected by it?

2. Whether the preliminary injunction issued herein by the Supreme Court, Broome County (Brink, J.), was and is too broad, and thereby violated and violates the

constitutional rights of free speech and of due process of the petitioners and other persons who might be subject to the order?

Constitutional and Statutory Provisions Involved.

This case involves Section 6313 of the Civil Practice Law and Rules of the State of New York, Section 210(1) of the Civil Service Law of the State of New York and the First and Fourteenth Amendments to the United States Constitution. These and all other relevant statutes are reprinted in Appendix H, *infra*.

Statement of the Case.

A. Background.

Whether or when the underlying action herein was commenced was at issue in the courts below. An *ex parte* order to show cause requesting a preliminary injunction and containing a temporary restraining order signed by the Hon. Robert O. Brink, Justice, Supreme Court, County of Broome, on October 11, 1972, made returnable before him on October 18, 1972, together with supporting papers and a summons and complaint demanding that the defendants named therein be temporarily enjoined, restrained and prohibited from certain acts enumerated therein, were allegedly served by personal service upon Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James Trask. Service upon the New York Congress of Teachers was not affected, although personal service of the aforementioned papers was made upon one, Belen Bradley, a paid employee of that organization.

A temporary restraining order contained in the *ex parte* order to show cause aforementioned, which order is printed in its entirety in Appendix I, *infra,* provided in part as follows:

> "ORDERED that pending the hearing and determination of this motion, the individual Defendants herein, the Defendant Association, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff School Districts Schools; *from ~~picketing and by~~ marching on the school grounds of said School District during normal class hours, 7:45 A. M. to 3:35 P. M. on Monday through Friday;* from intimidating, coercing or in any way interferring with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; *from contacting in person or by phone those persons employed by District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion; and it is further* * * *" (record, p. 205). (Italics supplied.)

Thereafter an order to show cause to vacate respondent's *ex parte* order and temporary restraining order and to dismiss the complaint therein, was signed by Justice Brink on October 13, 1972 (record, p. 222), made returnable before him October 18, 1972, and was served with supporting papers on behalf of petitioners upon the attorneys for respondent on October 14, 1972.

In the aforesaid order to show cause petitioners moved to vacate respondent's temporary restraining order claim-

ing that the same was null and void *ab initio* upon the grounds, among others:

> "* * * that said order is overly broad and in violation of the constitutional rights of the defendants as guaranteed by the 1st and 14th Amendments to the Constitution of the United States * * *" (record, p. 222).

In his affidavit in support of petitioners' order to show cause to vacate the *ex parte* order and temporary restraining order, counsel for petitioners alleged at paragraph "10" thereof:

> "That the aforesaid order of Mr. Justice Brink purports to limit the rights of defendants to speak freely; to peacefully assemble and to petition for the redress of grievances. These rights are protected against governmental interferences by the 1st and 14th Amendments to the Constitution and by the Constitution of the State of New York" (record, p. 225).

The aforesaid order to show cause to vacate the *ex parte* order together with the affidavit of Bernard F. Ashe, Esq., in support thereof are printed at pages 53-57 of Appendix J, *infra.*

On October 18, 1972, Justice Brink heard oral arguments on petitioners' motions (record, pp. 2, 15 and 96-98), and counsel for petitioners argued that, irrespective of the authority and power of the court to issue the temporary restraining order, it had no right or power to enjoin conduct protected by the 1st and 14th Amendments to the United States Constitution in the absence of a clear demonstration that the conduct enjoined was unpeaceful and that the regular police authorities were unable to cope with such a situation, in the following manner:

"Section 211 of the Civil Service Law establishes, in my opinion, a special jurisdiction in the Supreme Court for the purpose of issuing an injunction in this kind of a situation, and I think it is significant that it is a special purpose statute, but nevertheless, Section 211 provides for injunctive relief only. I do not think that section necessarily gives the Court the expressed authority to enjoin other conduct.

"The Court: Wouldn't it be a matter of common sense that it was incidental to the strike?

"Mr. Ashe: I am not sure that is constitutionally permitted if the conduct itself is not unlawful. I think as a general proposition, the concept of picketing and other modes of marching, gathering in peaceful assembly, and what have you is conduct which is constitutionally protected by the First and Fourteenth Amendments. I think that kind of conduct can only be restrained where it has been clearly demonstrated—and I don't think there is any clear demonstration—where it has been clearly demonstrated; one, that it is unpeaceful; two, that the regular police authorities are unable to cope with the situation and, therefore, the extraordinary power of the Court is necessary to attempt to remedy that situation to abort what may be irreparable harm" (record, pp. 5-6).

At the close of oral arguments on the aforesaid motion to vacate, Justice Brink denied the same from the bench stating:

"The Court: The Court has considered the points that you have raised. The decision of the Court is the motion to vacate the stay and the show cause order and the injunction contained therein is denied. And the Court will now proceed to consider the application for a preliminary injunction, and you say you are prepared to offer testimony at this time?" (record, p. 15.)

Thereafter Justice Brink heard testimony offered by respondent in support of its request for a preliminary injunction and at the close of said testimony decided to grant respondent's request for a preliminary injunction against the Susquehanna Teachers' Association, all of its officers, and all of the members thereof individually, and to deny said request with respect to the New York State Congress of Teachers on the ground that the proof did not establish justification for a temporary injunction against that organization (record, pp. 98-99). The aforesaid decision of the court from the bench is printed in Appendix E, *infra*. The court did not otherwise issue a written decision.

On October 19, 1972, pursuant to the aforesaid decisions, Justice Brink signed an order denying petitioners' motion to vacate and dismiss and granting respondent's request for a preliminary injunction except with respect to the New York Congress of Teachers (record, pp. 201-203), which order is printed in Appendix F, *infra*, and which reads in part as follows:

> "ORDERED, that defendants' motion to vacate the *Ex Parte* Order to Show Cause with Restraining Order is denied; and it is further,
>
> "ORDERED, that Plaintiff's motion for a Preliminary Injunction against the Defendant New York Congress of Teachers is hereby denied; and it is further
>
> "ORDERED, that pending the final determination of this action, the Court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers, including but not limited to Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, all of the individual members of the Susquehanna Valley Teachers' Association, re-

straining them and the said teachers association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; *from marching, and from picketing on the school grounds of the Plaintiff School District on Monday through Friday from 7:45 A. M. to 3:35 P. M.;* from intimidating, coercing or in any way interferring with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said Plaintiff School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school." (Italics supplied.)

The aforesaid order was entered in the office of the Broome County Clerk on October 19, 1972.

B. Proceedings in the Supreme Court, Appellate Division, Third Department.

Thereafter petitioners took an appeal to the Supreme Court, Appellate Division, Third Department, from all parts of said order except that portion denying respondent's motion for a preliminary injunction against the New York Congress of Teachers (record, p. 200).

In his brief-in-chief before the Appellate Division, Third Department, counsel for petitioners presented several questions for consideration by the court the sixth of which was:

> "Whether the restraining orders issued were too broad and thereby violated the constitutional rights of free speech of the defendants and other persons who might be subject to the order?" (Petioners' Appellate Division brief-in-chief, p. 3.)

Counsel for petitioners went on to argue in Point III of petitioners' brief-in-chief before the Appellate Division that the temporary restraining order of October 11, 1972, should not have been issued on the grounds, among others, that since it purported to restrain petitioners in the exercise of their protected First Amendment rights, namely "from marching," and "from contacting in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting plaintiff in carrying out lawful duties of maintaining school, pending the argument of this motion" (record, p. 205), and was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto, it amounted to a denial of petitioners' substantive and procedural rights to due process as guaranteed to them by the Fourteenth Amendment.

Counsel for petitioners in Point V of petitioners' brief-in-chief before the Appellate Division further contended that the order granting the preliminary injunction herein was overbroad and constitutionally void in that it amounted to a denial of petitioners' First Amendment rights without due process of law and a denial of petitioners' rights to the equal protection of law as guaranteed to them by the Fourteenth Amendment (petitioners' brief-in-chief, p. 75).

By decision dated January 3, 1974, the Appellate Division, Third Department, unanimously affirmed the order of Special Term. The decision of the Appellate

Division dealt with the constitutional issues raised on behalf of petitioners but found that they were without any substantial merit:

> "Defendants' contentions that the temporary restraining order should not have been issued without notice and that the preliminary injunction is unconstitutional are without any substantial merit" * * *" (43 A. D. 2d 200).

Subsequent to the receipt by the attorney for petitioners of a copy of the order of the Appellate Division on January 28, 1974, said order being dated and entered in the office of the clerk of that court on January 22, 1974, petitioners, by motion returnable before the Appellate Division, Third Department, March 4, 1974, applied to said court for an order granting leave to appeal to the Court of Appeals from the unanimous order of affirmance of the Appellate Division, Third Department, upon the grounds, among others, that this cause presented and involved important constitutional issues and principles relevant to and affecting the entire area of public employer-employee relations which ought to be determined and resolved by the highest court of the State of New York. The Appellate Division, Third Department, by order dated and entered in the office of the clerk of that court on May 21, 1974, denied petitioners' motion for permission to appeal to the Court of Appeals.

C. Proceedings in the New York State Court of Appeals.

Thereafter by motion returnable before the New York State Court of Appeals on June 10, 1974, petitioners moved in said court for an order allowing an appeal to be taken by the petitioners to that court from the order of the said Appellate Division, Third Department, upon the grounds, among others, that this cause raised and

raises and involves serious constitutional issues and principles important to and affecting the entire area of public employer-employee relations and specifically raising, among others, the following questions:

> "Was the *ex parte* order constitutionally void since it purported to restrain those subject to it from exercising their First Amendment rights, and was issued without notice to those affected by it * * *
>
> "Whether the restraining orders issued herein (record, pp. 204-205, 202-203) were too broad and thereby violated the constitutional rights of free speech of the defendants-appellants and other persons who might be subject to the order?" (Motion and brief before the New York Court of Appeals, pp. 19 and 21.)

In the brief submitted on behalf of petitioners to the Court of Appeals in support of their motion for leave to appeal to that body, counsel for petitioners contended in Point III therein that the temporary restraining order of October 11, 1972, since it purported to restrain petitioners in the exercise of their protected First Amendment rights and was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto although they were all available so to do, amounted to a denial of petitioners substantive and procedural rights to due process as guaranteed to them by the Fourteenth Amendment.

In Point V of petitioners' brief in support of their motion for leave to appeal to the Court of Appeals, counsel for petitioners contended that the order granting the preliminary injunction therein prohibiting them from marching and from picketing on the school grounds of the respondent school district was and is overbroad, and was and is therefore constitutionally void in that it amounts to a denial of petitioners First Amendment rights with-

out due process of law and a denial of petitioners rights to the equal protection of law guaranteed to them by the Fourteenth Amendment.

The Court of Appeals of the State of New York by decision and order dated July 11, 1974, dismissed petitioners' motion for leave to appeal to that body upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the New York Constitution.*

Thus, appellants have exhausted all of their available efforts to seek review in the courts of the State of New York.

Reasons for Granting the Writ.

I.

The *ex parte* Temporary Restraining Order of October 11, 1972, issued by Supreme Court, Broome County, State of New York, was and is constitutionally void in that it is overly broad and violates the constitutional rights of the petitioners as guaranteed by the First and Fourteenth Amendments to the United States Constitution and the Appellate Division's decision that petitioners' constitutional contentions were without any substantial merit is not in accord with applicable decisions of this Court.

Petitioners submit that the *ex parte* order of the Supreme Court, Broome County, State of New York, dated October 11, 1972, was overly broad and consequently constitutionally void insofar as it purported to restrain the petitioners in the exercise of, and therefore infringed upon, their protected First Amendment rights, namely

*To the best of petitioners' knowledge, no proceeding instituted pursuant to *Civil Service Law* §211 has been processed to the permanent injunction stage. Thus the issues raised herein would in all probability never be heard by the New York Court of Appeals.

"from marching" and "from contacting in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion * * *" (record, p. 205). And since it was issued *ex parte* without the benefit of an adversary hearing and without giving petitioners an opportunity to respond thereto, although they were all available so to do, it amounted to a denial of petitioners' substantive and procedural rights to due process guaranteed to them by the Fourteenth Amendment.

In *Carroll, et al., v. President and Commissioners of Princess Anne, et al.*, 393 U. S. 175 (1968), the Court said, in striking down a ten-day *ex parte* order initially issued by a Maryland County Court prohibiting a certain organization from holding within that time any public rallies or meetings:

> "The 10-day order here must be set aside because of a basic infirmity in the procedure by which it was obtained. It was issued *ex parte*, without any effort, however informal, to invite or permit their participation in the proceedings. There is a place in our jurisprudence, for *ex parte* issuance, without notice, of temporary restraining orders of short duration; but there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate.
>
> "* * * Prior restraint upon speech suppresses the precise freedom which the first Amendment sought to protect against abridgment.
>
> *"The court has emphasized that '[a] system of prior restraints of expression comes to this Court bearing a heavy presumption against its constiutional validity.' Bantam Books v. Sullivan,* 372 U. S. 58, 70 (1963); *Freedman v. Maryland,*

380 U. S. 51, 57 (1965). *And even where this presumption might otherwise be overcome, the Court has insisted upon careful procedural provisions, designed to assure the fullest presentation and consideration of the matter which the circumstances permit. As the Court said in Freedman v. Maryland, supra, at 58, a noncriminal process of prior restraints upon expression 'avoids constitutional infirmity only if it takes place under procedural safeguards designed to obviate the dangers of a censorship system.'* • • •

"The value of a judicial proceeding, as against self-help by the police is substantially diluted where the process is *ex parte,* because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. *The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication.*

"The same is true of the fashioning of the order. *An order issued in the area of First Amendment rights must be couched in the narrowest terms that will accomplish the pinpointed objective permitted by constitutional mandate and the essential needs of the public order.* In this sensitive field, the State may not employ 'means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved.' *Shelton v. Tucker,* 364 U. S. 479, 488 (1960). In other words, *the order must be tailored as precisely as*

> *possible to the exact needs of the case. The participation of both sides is necessary for this purpose."* 393 U. S. 180-184. (Italics supplied.)

See also, *School Committee v. Westerly Teachers Assn.*, 299 A. 2d 441, 82 LRRM 2567 (Sup. Ct., Rhode Island, 1973) at page 2570, wherein the Rhode Island Supreme Court, in striking down an *ex parte* restraining order enjoining a teacher strike, said:

> "*Ex parte* relief in instances such as teachers-school committee disputes can make the judiciary an unwitting third party at the bargaining table and a potential coercive force in the collective bargaining process. We embrace the position taken in *School District v. Holland Education Assn.*, 380 Mich. 314, 157 N. W. 2d 206, 67 LRRM 2916 (1968), where it was held that the trial court, before giving affirmative relief, should normally conduct a hearing where it would review what has gone on between the disputants and then determine whether injunction should issue and if so, on what terms and for what period of time."

Groppi v. Leslie, 404 U. S. 496 (1972), is also instructive along these lines. There the Court, in rejecting as violative of due process the action on the part of the Wisconsin Assembly in holding petitioner in contempt without giving him notice or an opportunity to answer, stated that:

> "Indeed we have stated time and again that reasonable notice of a charge and an opportunity to be heard in defense before punishment is imposed are basic in our system of jurisprudence • • • In *Mullone v. Central Honor Trust Co.*, 339 U. S. 306 (1950), the Court stated:

> "'Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case. 339 U. S. at 313'" (at p. 502).

Picketing as a mode of free speech was approved in *Thornhill v. State of Alabama,* 310 U. S. 88, 7 LRRM 697 (1940), wherein at 7 LRRM 699, 703 and 704, the Court stated:

> "First. The freedom of speech and of the press, which are secured by the First Amendment against abridgment by the United States, are among the fundamental personal rights and liberties which are secured to all persons by the Fourteenth Amendment against abridgment by a state • • •
>
> "The freedom of speech and of the press guaranteed by the Constitution embraces at least the liberty to discuss publicly and truthfully all matters of public concern without previous restraint or fear of subsequent punishment • • •
>
> "In the circumstances of our times the dissemination of information concerning the facts of a labor dispute must be regarded as within that area of free discussion that is guaranteed by the Constitution. *Hague v. C. I. O.,* 307 U. S. 496 (4 LRRM 501); *Schneider v. State,* 308 U. S. 147, 155, 162-63 (5 LRRM 659). See *Senn v. Tile Layers Union,* 301 U. S. 468, 478."

The Court further went on to specifically emphasize that restraint of this kind of activity must be seriously limited:

> "• • • Free discussion concerning the conditions in industry and the causes of labor disputes appear to us indispensable to the effective and intelli-

gent use of the processes of popular government to shape the destiny of modern industrial society. The issues raised by regulations, such as are challenged here, infringing upon the right of employees effectively to inform the public of the facts of a labor dispute are part of this larger problem. We concur in the observation of Mr. Justice Brandeis, speaking for the Court in *Senn's* case (301 U. S. at 478): 'Members of a union might, without special statutory authorization by a State, make known the facts of a labor dispute, for freedom of speech is guaranteed by the Federal Constitution.'

* * *

"The power and the duty of the State to take adequate steps to preserve the peace and to protect the privacy, the lives, and the property of its residents cannot be doubted. But no clear and present danger of destruction of life or property, or invasion of the right of privacy, or breach of the peace can be thought to be inherent in the activities of every person who approaches the premises of an employer and publicizes the facts of a labor dispute involving the latter * * *."

See also, *Dause, et al., v. Bates,* 359 F. Supp. 139 (W. D. Ky. 1973); *Amalgamated Fruit Employees Union, Local 590, et al., v. Logan Valley Plaza, Inc., et al.,* 391 U. S. 308 (1968); *Bell v. Burson,* 402 U. S. 525 (1971); *Board of Regents v. Roth,* 408 U. S. 564 (1972); *Perry v. Sindermann,* 408 U. S. 593 (1972).

In *Boddie v. State of Connecticut,* 401 U. S. 371 (1970), in speaking of due process the Court stated:

"American society, of course, bottoms its systematic definition of individual rights and duties, as well as its machinery for dispute settlement, not on custom or the will of strategically placed individuals, but on the common-law model. It is

> to the courts, or other quasi-judicial official bodies, that we ultimately look for the implementation of a regularized, orderly process of dispute settlement. Within this framework, those who wrote our original Constitution, in the Fifth Amendment, and later those who drafted the Fourteenth Amendment, recognized the centrality of the concept of due process in the operation of this system. Without this guarantee that one may not be deprived of his rights, neither liberty nor property, without due process of law, the State's monopoly over techniques for binding conflict resolution could hardly be said to be acceptable under our scheme of things. Only by providing that the social enforcement mechanism must function strictly within these bounds can we hope to maintain an ordered society that is also just. It is upon this premise that this Court has through years of adjudication put flesh upon the due process principle."

See also, *Cross Company v. United Automobile, Aircraft and Agricultural Implement Workers of America, Local 155, AFL-CIO, et al.*, 123 N. W. 2d 215 (Mich. Sup. Ct. 1963), for a detailed discussion of the undesirable impact of the interjection of the court's injunctive power into a public employee collective bargaining dispute even in the face of an ongoing strike and a civil prohibition against such strikes.

It should be noted at this point that Rule 65(b) of the Federal Rules of Civil Procedure further underscores and reflects the paramount importance of notice with respect to due process rights, by the stringent limitations and conditions precedent which it places upon the issuance of a temporary restraining order in any case, let alone one involving a defendant's First Amendment rights:

"Rule 65. Injunctions

"(b) Temporary Restraining Order; Hearing Notice; Duration. A temporary restraining order may be granted without written or oral notice to the adverse party or his attorney only if (1) it clearly appears from specific facts shown by affidavit or by the verified complaint that immediate and irreparable injury, loss, or damage will result to the applicant before the adverse party or his attorney can be heard in opposition, and (2) the applicant's attorney certifies to the court in writing the efforts, if any, which have been made to give the notice and the reasons supporting his claim that notice should not be required. Every temporary restraining order granted without notice shall be indorsed with the date and hour of issuance; shall be filed forthwith in the clerk's office and entered on record; shall define the injury and state why it is irreparable and why the order was granted without notice; and shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or unless the party against whom the order is directed consents that it may be extended for a longer period. The reasons for the extension shall be entered of record. In case a temporary restraining order is granted without notice, the motion for a preliminary injunction shall be set down for hearing at the earliest possible time and takes precedence of all matters except older matters of the same character; and when the motion comes on for hearing the party who obtained the temporary restraining order shall proceed with the application for a preliminary injunction and, if he does not do so, the court shall dissolve the temporary restraining order. On 2 days' notice to the party who obtained the temporary restraining order without notice or on such shorter notice to that party as the court may prescribe, the ad-

> verse party may appear and move its dissolution or modification and in that event the court shall proceed to hear and determine such motion as expeditiously as the ends of justice require."

Section 210 of the *Civil Service Law* prohibits strikes by public employees, and a strike is defined in Section 201, subdivision 9, of said law as:

> "The term 'strike' means any strike or other concerted stoppage of work or slowdown by public employees."

However, nowhere in the *Civil Service Law* can a provision be found which would otherwise limit public employees in the exercise of their First Amendment rights.

Despite petitioners' contention as outlined above, the Appellate Division, Third Department, has taken the position that such contentions are without any substantial merit citing in support of its position the following cases, *City of New York v. DeLury,* 23 N. Y. 2d 175, 295 N. Y. S. 2d 901 (1968), app. dsmd. 394 U. S. 455 (1969), reh. den. 396 U. S. 872 (1969); *Rankin v. Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625 (1968); *Matter of State of New York v. Fuller,* 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dept. 1968). However, it is respectfully submitted that those cases are distinguishable from the one at bar, and therefore not applicable to it. The *DeLury* case it would seem, stands for the proposition that Section 210 of the *Civil Service Law* prohibiting strikes in order to achieve a state policy in an area open to state regulation, is not unconstitutional but did not, and does not, hold that Section 210 of the *Civil Service Law* limits in any way a citizen's First Amendment rights, in this case the right to free speech and free expression as evidenced by marching and/or contacting

or talking to others. The objection to the temporary restraining order in the case at bar is that it arbitrarily curtailed First Amendment rights of the petitioners and other persons affected by it, which rights were not restricted by Section 210 of the *Civil Service Law,* and therefore, because it was issued without notice, it further violated the rights of the petitioners to the due process of law guaranteed to them by the Fourteenth Amendment to the United States Constitution.

Rankin v. Shanker held that public employees and labor organizations representing them were not entitled to a trial by jury in a criminal contempt proceeding for violation of Section 210 of the *Civil Service Law,* and also the classification which differentiates between strikes by public employees and private employees is reasonable and does not offend the constitutional guarantees of equal protection, but did not treat the question as to whether or not a temporary restraining order which goes beyond Section 210 of the *Civil Service Law* and in fact abridges the First Amendment rights of the persons affected by it, may be granted without notice and without violating the due process provisions of the Fourteenth Amendment, and is therefore inapplicable to the case at bar.

The *ex parte* temporary restraining order issued in the *Fuller* case also cited by the Appellate Division was not overbroad as was the temporary restraining order issued herein in that the order in the *Fuller* case specifically prohibited those affected by it from striking and encouraging and condoning such a strike, but did not, as did the order here, purport to restrain *those affected by it from exercising their right to free speech by marching or contacting others.* See *Concerned Consumers League v. O'Neil, et al.,* 371 F. Supp. 644 (D.C., E.D. Wisc. 1974).

In view of the above it is respectfully submitted that the *ex parte* temporary restraining order of October 11, 1972, was constitutionally void in that it was overly broad and therefore infringed upon petitioners' protected First Amendment rights, and in that it was issued without affording petitioners the right to be heard, depriving petitioners of their substantive and procedural due process rights guaranteed by the Fourteenth Amendment. It is further submitted that the decision of the Appellate Division, Third Department, holding that petitioners' constitutional contentions, as outlined above, were without any substantial merit, was not in accord with applicable decisions of this court.

II.

The order of Supreme Court, Broome County, State of New York, dated October 19, 1972, granting a preliminary injunction is constitutionally void insofar as it fringes upon, interferes with and denies petitioners' First Amendment rights protected by the United States Constitution, and the decision of the Appellate Division, Third Department, that petitioners' contentions in this regard were without any substantial merit is not in accord with applicable decisions of this Court.

The *Civil Service Law* of the State of New York, Section 210, prohibits public employees from engaging in a strike. Nowhere in the *Civil Service Law* or any other law for that matter, relating to public employees, can any provision be found which would permit an interference with and a denial of First Amendment rights guaranteed to public employees as well as all other citizens under the Constitution of the United States.

To the extent then, that the order granting a preliminary injunction herein forbids petitioners and prohibits them "from marching and from picketing on the school grounds of the Plaintiff School District" (record, p. 203), it is overbroad, particularly in view of the fact that the superintendent of schools considered the teachers to be fired and no longer employed by the School District, and constitutionally void in that it amounts to a denial of petitioners' First Amendment rights without due process of law and a denial of petitioners' rights to the equal protection of laws as guaranteed to them by the Fourteenth Amendment.

Francis P. Donnelly, Superintendent of Schools within respondent's District, testified at the hearing on the motion for a preliminary injunction, that respondent's teachers went on strike on Friday, October 6, 1972 (record, p. 23), that the following Monday, October 9, 1972, was a legal holiday (record, p. 28), and that on the following Tuesday, October 10, 1972, schools in the district were open for orientation of new teachers, so that the schools could safely open on the following day (record, p. 29). Nelson Spaulding, Vice-Principal of respondent's School District testified at the hearing that the School District considered itself fully staffed on Wednesday, October 11, 1972 (record, p. 59), that Wednesday, October 11, 1972, was a full school day (record, p. 59), and that on Wednesday, October 11, 1972, there was adequate personnel to handle normal school business on that day in the District (record, p. 60).

Superintendent Donnelly went on to testify at the hearing that the students, as a result of the teacher absences, lost time from school amounting to two days, October 6th and October 10th, 1972 (record, p. 39). He went on to testify that on October 6th, 130 teachers absented themselves from their teaching duties (record,

p. 24), and that the District had hired a new teaching staff (record, p. 44). He continued on to say that the new teachers hired were considered by him to be permanent teachers, and that about one hundred and thirty of them were hired to replace the absent teachers (record, p. 49). When asked the following questions by counsel for the defendants, Mr. Donnelly gave the following answers (record, p. 50):

> "Q. Now, if I remember correctly, you said there was a total of 182; is that the total school personnel professional complement? A. Yes.
> "Q. And of that number, approximately 160 were classroom teachers? A. Yes.
>
> • • •
>
> "Q. Is it my understanding that you have hired 130 permanent replacements? A. Yes.
> "Q. Would it be correct then to say insofar as the school district is concerned, at this time, that it has the same staff in terms of numbers that it had as of October 5? A. We have more.
> "Q. You have more? A. Yes.
> "Q. With respect to the normal school functions, this personnel then is adequate to conduct those school functions? A. Yes."

On re-cross examination, Superintendent Donnelly was asked the following questions, and gave the following answers (record, pp. 80-83):

> "Q. I am not sure, Mr. Donnelly, that I understand what you are saying. Would you repeat for me what you meant by permanent replacements? A. Yes. We have replaced the striking teachers with permanent teachers, as I stated before, and these people will remain with us as long as they perform their duties well until some court or some law is given to us reinstating some other teachers.

"Q. Is it my understanding then, that at the moment that you replaced 130 teachers; that you considered those 130 teachers to be absent from work and no longer employed by the school district? A. Yes, sir.

"The Court: Have you discharged them?
"The Witness: Yes.
"The Court: Have you sent notices discharging them?
"The Witness: We have told them that they are discharged as teachers? They have tenure; don't they? Some of them did, didn't they?
"The Witness: They did * * *.

* * *

"Q. Have you ever, at any time, made the statement to the press or to the teacher's representatives, that they may consider themselves unemployed? A. Yes.

"Q. As of what time did you consider the teachers who have absented themselves as being unemployed? A. As soon as they were on strike.
"Q. That would be as of October 6th? A. As soon as they were on strike.
"Q. That would be as of October 6th? A. Yes, sir.
"Q. So, it is your testimony then, as far as the plaintiff District is concerned, that as of the time the teachers absented themselves on October 6th until the present time that you have not considered them to be employees of the district during that period? A. I personally did not consider them as being employees."

In view of the above it is therefore submitted that the record below far from containing any evidence tending to show that respondent had, or was about to suffer, immediate and irreparable injury and/or loss, or damages, on the contrary, from the testimony of Superintendent Donnelly and Vice-Principal Nelson Spaulding, it was

clear that the School District was able to operate normally, even despite the alleged absences of most of its regular teachers, whom it considered fired at the time of the hearing below.

There was absolutely no showing, as the transcript of the hearing below abundantly indicates, that there existed a countervailing state interest of such overriding significance which would permit the court to so interfere with petitioners' rights to free speech, and expression, and of the right to peacefully assemble. See *Boddie v. State of Connecticut, supra.* See also *Carroll, et al., v. President and Commissioners of Princess Ann, et al., supra; Thornhill v. State of Alabama, supra,* and *Amalgamated Food Employees Union, Local 590, et al., v. Logan Valley Plaza, Inc., et al., supra.* That this free speech right of teachers exists even in the face of unlawful strike activity is supported by *Dause, et al., v. Bates, supra,* wherein the court in rejecting the right of a school board to demote the plaintiffs because they supported a strike stated as follows at 369 F. Supp. 147:

> "In previous cases such as *Keyishian v. Board of Regents,* 385 U. S. 589 (1967); *Shelton v. Tucker,* 364 U. S. 479 (1960); and *Wieman v. Updegraff,* 344 U. S. 183 (1952), the Supreme Court has jealously protected the 1st Amendment rights of teachers to speak out on matter of public importance. This Court is of the firm opinion that the support by a teacher of a strike which has subsequently been declared civilly illegal is not such conduct as warrants the right of a school board to dismiss him or demote him. In this regard, see particularly *Keyishian v. Board of Regents, supra,* 385 U. S. at pages 605 and 606.
>
> "The Court's attention has been called to footnote 3 at page 570 of *Pickering v. Board of Education, supra,* but this lends no comfort to defendants since plaintiffs, in this case, were not concerned

with public criticism of their superiors but were advocating a strike in order to further their economic cause.

"*Keyishian*, when read closely, cites the fact that teachers are free to indulge their 1st Amendment rights, even to the point of advocating conduct which might prove to be civilly illegal, as long as such conduct is not in connection with subversion or violence, or is criminal in nature."

In short, it is submitted, that, even if the court felt compelled to issue a preliminary injunction because a strike by certain public employees allegedly existed, its order which went far beyond commanding those employees to return to work, and sought to restrict those individuals in the free exercise of their First Amendment rights, was unwarranted, unjustified by the proof, and constitutionally prohibited.

In holding petitioners' contention that the preliminary injunction was unconstitutional was without any substantial merit, the Appellate Division again cited the three cases previously referred to, namely, *City of New York v. DeLury, supra; Rankin v. Shanker, supra,* and *Matter of the State of New York v. Fuller, supra.* As indicated above, those three cases are distinguishable from the case at bar and inapplicable thereto. Neither of these cases hold, or even infer, that a court has the power to go beyond Section 210 of the *Civil Service Law* in forbidding public employees to strike; and further to forbid them to freely express their opinions and feelings with regard to a labor dispute, by marching or picketing when such activities unaccompanied by violence or a disturbance of the public peace constitute protected activity under the First Amendment to the United States Constitution. As was said in *Aurora Education Association v. Board of Education,* 490 F. 2d 431 (7th Cir., 1973):

> "Where a governmental body seeks by an overbroad regulation to preclude both lawful and unlawful speech, the regulation because of its overbreadth is a violation of guarantees of free speech and is unconstitutional." (Citations omitted.)

In view of the above it is again respectfully submitted that the order of Supreme Court, Broome County, State of New York, dated October 19, 1972, was overbroad, and as a consequence constitutionally void, and the decision of the Appellate Division, Third Department, holding that petitioners' constitutional contentions in that regard were without any substantial merit, is in error and not in accord with the applicable decisions of this Court.

Conclusion.

For the foregoing reasons, petitioners respectfully urge that this Court grant their petition for a writ of certiorari.

Dated: October 3, 1974.

Respectfully submitted,

BERNARD F. ASHE,
Counsel for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205
459-5400.

Of Counsel:

JAMES R. SANDNER,
ROCCO A. SOLIMANDO.

APPENDIX.

Appendix A—Order of Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal.

COURT OF APPEALS,

STATE OF NEW YORK.

At a session of the Court, held at Court of Appeals Hall in the City of Albany on the eleventh day of July, A. D. 1974.

Present:

Hon. Charles D. Breitel, Chief Judge, presiding.

---

3 Mo. No. 551

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondents,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

A motion for leave to appeal to the Court of Appeals in the above cause having been heretofore made upon the part of the appellants herein and papers having been duly submitted thereon and due deliberation thereupon had:

ORDERED, that the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

GEARON KIMBALL
Deputy Clerk

Appendix B—Decision of the Court of Appeals Dismissing Petitioners' Motion for Leave to Appeal.

3 Mo. No. 551

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondents,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Decision of Court of Appeals Jul 11 1974

Motion for leave to appeal dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

Appendix C—Order of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals.

At a Motion Term of the Appellate Division of the Supreme Court of the State of New York, in and for the Third Judicial Department, held at the Justice Building in the City of Albany, New York, on the 4th day of March, 1974.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

vs.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants-Appellants.

App. Div. 21795

A motion having been made by Defendants-Appellants at this term of court in the above-entitled proceeding for an order granting leave to appeal to the Court of Appeals: now, after reading and filing proof of due service of the notice of motion, the affidavit of Bernard F. Ashe, in support of the motion, and no one having appeared in opposition thereto, and the Court having rendered a decision on the 6th day of May, 1974, it is hereby

ORDERED that, said motion is denied, without costs.

Enter:

/s/ JOHN J. O'BRIEN
Clerk

Dated and Entered: May 21, 1974.
A True Copy:
JOHN J. O'BRIEN, Clerk

Appendix D—Memorandum Decision of the Appellate Division, Third Department, Denying Petitioners' Motion for Leave to Appeal to the Court of Appeals.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

May 6, 1974

21795

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Motion for permission to appeal to the Court of Appeals denied, without costs.

Herlihy, P. J., Cooke, Sweeney, Kane and Main, JJ., concur.

Appendix E—Bench Decision of Justice Brink, Supreme Court, Broome County, Printed From the Record, Pages 15, 98-99.

SUPREME COURT, STATE OF NEW YORK,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT No. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants.

Index No. 102266

Appearances:

Messrs. Shaw, Esworthy, O'Brien & Crowley (Maurice P. O'Brien, Esq., and Frank C. Shaw, Esq., of Counsel), Attorneys for Plaintiff, 123 Front Street, Binghamton, New York.

Bernard F. Ashe, Esq., Attorney for Defendants, 80 Wolf Road, Albany, New York.

Richard N. Aswad, Esq., Attorney for Defendants, 106 Front Street, Binghamton, New York.

The issues in the above entitled action came on for trial at an Adjourned Special Term of Supreme Court

held in the court house, Binghamton, New York, on Wednesday, October 18, 1972, before Hon. Robert O. Brink, Justice.

The Court: The Court has considered the points that you have raised. The decision of the Court is the motion to vacate the stay and the show cause order and the injunction contained therein is denied. (Record—Page 15.)

• • •

The Court: The Court grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers name [*sic*] in the show cause order, and all of the members of the organization individually, restraining them and the said Teachers' Association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said defendants from engaging in a strike from work by absenting themselves individualy or en masse from their assigned duties as classroom teachers in plaintiff school district schools, from marching and picketing on the school grounds of said school district on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said school district; from coercing in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting the school board in carrying on its lawful duties of maintaining school.

The Court denies the action of an injunction against the New York State Congress of Teachers on the ground that the proof does not establish justification for a temporary injunction against that organization. You may submit an order. (Record—Pages 98-99.)

Appendix F—Order of Supreme Court, Broome County, Dated October 19, 1972.

At an adjourned Special Term of the Supreme Court of the State of New York held in and for the County of Broome at the County Courthouse in the City of Binghamton, New York, on the 19th day of October, 1972.

Present:

Honorable Robert O. Brink, Justice.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Defendants-Appellants.

The Plaintiff having duly moved this Court for an Order granting a preliminary injunction enjoining the Defendants above named, the Defendant Associations, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engag-

ing in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; from marching on the school grounds of said School District on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from said School buildings of said School District; from coercing in person or by phone those persons employed by the School District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining School; and

The Defendants having moved for an Order of this Court vacating Plaintiff's Order to Show Cause with Temporary Restraining Order as being null and void *ab initio;* and

Said motions having regularly come on to be heard on the 18th day of October, 1972.

Now, upon reading and filing the Order to Show Cause dated October 13, 1972, seeking to vacate the *ex parte* Order and Temporary Restraining Order, the affidavits of Bernard F. Ashe, sworn to the 13th and 18th days of October, 1972, the affidavit of Lynn H. Blanton, sworn to the 13th day of October, 1972 with accompanying exhibit in support of said motion, and upon reading and filing the Order to Show Cause with Restraining Order signed the 11th day of October, 1972 with due proof of service thereof; the accompanying affidavits of Francis P. Donnelly dated October 10, 1972, the Summons and Complaint verified the 10th day of October, 1972 with attached exhibits, and the Court having taken the testimony and received evidence in the matters before it, and having heard Frank C. Shaw, Jr. and Maurice P. O'Brien, attorneys for the Plaintiff and Bernard F. Ashe and Richard N. Aswad, attorneys for the Defendants, and due deliberation having

been had, it appears that a cause of action exists in favor of the Plaintiff against the Defendants to enjoin an illegal strike and conduct related thereto and that Plaintiff is entitled to a preliminary injunction against the Defendants; Susquehanna Valley Teachers' Association, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, and that the proof failed to justify a preliminary injunction against the Defendant, New York Congress of Teachers; now on motion of the attorneys for the plaintiff; it is

ORDERED, that defendants' motion to vacate the *Ex Parte* Order to Show Cause with Restraining Order is denied; and it is further,

ORDERED, that Plaintiff's motion for a Preliminary Injunction against the Defendant, New York Congress of Teachers is hereby denied; and it is further

ORDERED, that pending the final determination of this action, the Court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association, all of its officers, including but not limited to Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy and James C. Trask, all of the individual members of the Susquehanna Valley Teachers' Association, restraining them and the said teachers Association, their officers, members, agents, servants or anyone acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teachers in Plaintiff's School District Schools; from marching, and from picketing on the school grounds of the Plaintiff School District on Monday through Friday from 7:45 A. M. to 3:35 P. M.; from intimidating coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and

from the school buildings of the said Plainitff School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school.

Signed this 19th day of October, 1972.

Enter:

/s/ ROBERT O. BRINK
J. S. C.

/s/ MAURICE P. O'BRIEN
Attorney

(Certified to be a true and complete copy by Maurice P. O'Brien Esq.)

Appendix G—Decision, Opinion and Order of the Appellate Division, Third Department, Affirming the Order of Supreme Court, Broome County.

SUPREME COURT,

APPELLATE DIVISION—THIRD JUDICIAL DEPARTMENT.

21795

January 3, 1974

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

v.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Order affirmed, with costs.

Opinion *Per Curiam.*

Herlihy, P. J., Cooke, Sweeney, Kane and Main, JJ., concur.

#21795

STATE OF NEW YORK, SUPREME COURT,

APPELLATE DIVISION—THIRD DEPARTMENT.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, *et al.*,

Appellants.

Argued, November 19, 1973.

Before:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

APPEAL from so much of an order of the Supreme Court at Special Term (Robert O. Brink, J.), entered October 19, 1972 in Broome County, which granted plaintiff's motion for a preliminary injunction as against the individually named defendants and the defendant Susquehanna Valley Teachers' Association.

Bernard F. Ashe, for appellants, 80 Wolf Road, Albany, New York 12205.

Shaw, Esworthy, O'Brien & Crowley (Frank C. Shaw of counsel), for respondent, 123 Front Street, Binghamton, New York 13905.

Opinion for Affirmance.

Per Curiam.

This is an appeal from so much of an order of the Supreme Court at Special Term, entered October 19, 1972 in Broome County, which, after hearing testimony and accepting evidence, granted plaintiff's motion for a preliminary injunction as against the individually named defendants and the defendant Susquehanna Valley Teachers' Association.

On October 6, 1972, 130 members of the 160-member faculty of the plaintiff's school district went on strike. The defendant Susquehanna Valley Teachers' Association is the bargaining representative under the Taylor Law for all of the teachers in the plaintiff's school district. The strike lasted until November 1, 1972. On October 11, 1972 the Supreme Court at Special Term, upon application of the plaintiff, granted an order to show cause why a preliminary injunction should not be issued, said proceeding being returnable on October 18, 1972. The order to show cause provided that service of the order "and the papers on which it was based (the summons and complaint)" be made on or before October 12, 1972 by delivery "to any of the above officers of Defendant Teachers' Associations and on any person acting for or in behalf of the New York Congress of Teachers in this matter. Service of certified copy of this order on persons unnamed herein shall be sufficient."

Certified copies of the order and other papers in the proceedings were served on the individuals named (the above named individual defendants), two of whom were the president and the treasurer of the Susquehanna Valley

Teachers' Association. Certified copies of the order were also served on individual strikers.

On October 13, 1972 the defendants moved to dismiss the proceeding and to vacate the October 11 *ex parte* order, said motion being made returnable on the same date as plaintiff's motion, October 18, 1972. Upon the return date, Special Term denied the defendants' motion for dismissal and at the close of testimony on behalf of the plaintiff in support of a preliminary injunction it granted such injunction as against the Susquehanna Valley Teachers' Association and all of its officers and members individually, denying, however, such an injunction as to the New York State Congress of Teachers as the plaintiff had failed to prove justification as against that organization.

Upon this appeal, the defendants raise several issues, to wit:

1—The court did not acquire jurisdiction over the New York Congress of Teachers, the Susquehanna Valley Teachers' Association, the named individual defendants or the unnamed defendants;

2—the complaint was defective and failed to state a cause of action;

3—the temporary restraining order of October 11, 1972 should not have been issued;

4—the preliminary injunction should not have been granted;

5—the order granting a preliminary injunction is constitutionally void insofar as it infringes upon, interferes with and denied defendants' First Amendment rights protected by the United States Constitution.

The sole issue which might have any merit in this court is the contention of the defendants that the court did not acquire jurisdiction over them. Section 13 of the General

Associations Law, as applicable to jurisdiction over unincorporated associations, provides in part as follows:

> The service of summons, subpoena or other legal process of any court upon the president, vice president, treasurer, assistant treasurer, secretary, assistant secretary, or business agent, *in his capacity as such* shall constitute service upon a labor organization. Such service shall be made on such individuals in the manner provided by law for the service of a summons on a natural person (emphasis supplied).

There is no doubt that the appropriate officers of the Susquehanna Valley Teachers' Association were personally served with the necessary papers in this proceeding. However, the defendant associations contend that, in asmuch as such officers were named in the proceeding as individual defendants, they were not served as officers of the association. Nevertheless, paragraph three of the complaint indicates the representative capacity of several of the individual defendants and there is no doubt that they were served in their representative capacity as well as their individual capacity and that the papers would give notice to them of such service (see *Matter of Motor Haulage Co. [Teamsters' Union]*, 298 N. Y. 208). Furthermore, the defendants moved for relief in the proceeding without any issue as to proper service and, accordingly, the court acquired jurisdiction in personam.

Upon the present record the defendants have failed to establish a lack of jurisdiction as to the Susquehanna Valley Teachers' Association. Defendants' contentions that the temporary restraining order should not have been issued without notice and that the preliminary injunction is unconstitutional are without any substantial merit (see *City of New York v. De Lury*, 23 N. Y. 2d 175, app. dsmd.

394 U. S. 455, reh. den. 396 U. S. 872; *Rankin v. Shanker*, 23 N. Y. 2d 111; *Matter of State of New York v. Fuller*, 31 A. D. 2d 71).

The record establishes that the plaintiff made a preliminary showing of immediate and irreparable injury which would result if the strike continued and there was no abuse of discretion on the part of Special Term in granting the preliminary injunction.

The order should be affirmed, with costs.

At a Term of the Appellate Division of the Supreme Court of the State of New York, held in and for the Third Judicial Department, at the Justice Building in the City of Albany, New York, commencing on the 12th day of November, 1973.

Present:

Hon. J. Clarence Herlihy,
Presiding Justice,
Hon. Lawrence H. Cooke,
Hon. Michael E. Sweeney,
Hon. T. Paul Kane,
Hon. Robert G. Main,
Associate Justices.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Broome County Clerk's Index No. 102266.

The Appellants having appealed from so much of an order of the Supreme Court of Broome County, entered on the 19th day of October, 1972, in the office of the clerk of the County of Broome which granted plaintiff's motion for a preliminary injunction as against the individually

named defendants and the defendant, Susquehanna Valley Teachers' Association, and said appeal having been presented during the above-stated term of this Court, and having been argued by Bernard F. Ashe, Esq., of counsel for appellant, and by Frank C. Shaw, Esq., of counsel for respondent, and, after due deliberation, the Court having rendered a *Per Curiam* opinion on the 3rd day of January, 1974, it is hereby

ORDERED that the order below is hereby affirmed, with costs.

ENTER:

JOHN J. O'BRIEN
Clerk

Dated and Entered: January 22, 1974

A True Copy
JOHN J. O'BRIEN
Clerk

Appendix H—Constitutional and Statutory Provisions.

First Amendment

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

* * *

Fourteenth Amendment

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are

citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

• • •

Civil Service Law Art. 14

§210. Prohibition of strikes

1. No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

• • •

Civil Practice Law and Rules Art. 63

§6313. Temporary restraining order

(a) Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law, nor against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties. This section shall not apply to the attorney general when an application is made by the attorney-general in a proceeding under article twenty-three-a of the general business law.

Appendix I—The *ex parte* Order to Show Cause with Temporary Restraining Order Signed by Justice Brink, Supreme Court, Broome County.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

Upon reading and filing the annexed Summons and Complaint in this action duly verified by the Plaintiff on the 10th day of October, 1972 together with the Affidavits and Exhibits affixed thereto, and the Affidavit of Francis P. Donnelly seeking an Order to Show Cause, let the Defendants show cause before this Court at an adjourned Special Term thereof to be held in and for the County of Broome in the County Courthouse on the 18th day of October, 1972 in the City of Binghamton, New York at 10:00 o'clock in the forenoon, or as soon thereafter as Counsel can be heard at the Chambers of the Undersigned Justice why a preliminary injunction should not be granted herein injoining [*sic*] the individual Defendants,

the Defendant Associations, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teacher in Plaintiff School District Schools; from marching on the School grounds or said School District on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, all on the grounds that Defendants are or are procuring or suffering to be done acts in violation of the Plaintiff's rights respecting the subject of this action; that Defendants' actions are contrary to the provisions of Section 210 of the Civil Service Law of the State of New York and that Plaintiff is entitled to an injunction under Section 211 of said Law and it further appearing that immediate and irreparable injury, loss or damage will result unless the Defendants are restrained before a hearing can be had and it is further

ORDERED that pending the hearing and determination of this motion, the individual Defendants herein, the Defendant Association, their officers, members, agents, servants and all persons whomsoever known or unknown acting in their behalf or in consort or in confederation with said Defendants from engaging in a strike from work by absenting themselves individually or en masse from their assigned duties as classroom teacher in Plaintiff School District's Schools; from picketing and by marching on the school grounds of said School District during normal class hours, 7:45 A.M. to 3:35 P.M. on Monday through

Friday; from intimidating coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the School buildings of said School District; . m contacting in person or by phone those persons e. lo.ed by the District or who voluntarily or otherwise . . Pl intiff in carrying out its lawful duties of ma.....ning school, pending the argument of this motion; and it is further

ORDERED that service of this Order and the papers upon which it is based (and the Summons and Complaint) be made on or before the 12th day of October, 1972 by delivering copies of said papers and a certified copy of this Order to any of the above officers of said Defendant Teachers' Associations and on any person acting for or in behalf of the New York Congress of Teachers in this matter. Service of certified copy of this Order on persons unnamed herein shall be sufficient.

ENTER:

Signed at Chambers
this 11th day of October, 1972.

/s/ ROBERT O. BRINK
J. S. C.

(Certified to be a true and complete copy by Frank C. Shaw Esq.)

Appendix J—Order to Show Cause to Vacate *ex parte* Order and Temporary Restraining Order and Affidavit of Bernard F. Ashe, Esq., in Support Thereof.

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

On reading and filing the annexed affidavit of Bernard F. Ashe, sworn to the 13th day of October, 1972, the annexed affidavit of Lynn H. Blanton, sworn to the 13th day of October, 1972, and the Order of Mr. Justice Robert O. Brink, dated October 11, 1972, and all of the papers upon which said order was granted,

Let the plaintiff show cause before this court at an Adjourned Special Term thereof to be held at the Broome County Court House in the City of Binghamton, New York, on the 18th day of October, 1972, at 10:00 o'clock in the forenoon or as soon thereafter as counsel can be heard at the Chambers of the undersigned Justice why an order should not be made, pursuant to Section 6314

of the Civil Practice Law and Rules, vacating the said Order to Show Cause and Temporary Restraining Order as being null and void *ab initio* upon the grounds that plaintiff has failed to properly commence the action by filing a proper complaint; that plaintiff has not shown any threat or occurrence of immediate irreparable injury, loss or damage justifying the issurance [*sic*] of such order; that said order is overly broad and in violation of the constitutional rights of the defendants as guaranteed by the 1st and 14th Amendments to the Constitution of the United States and by the Constitution of the State of New York; and that the complaint does not state a cause of action and for such other and further relief as to the court may seem just and proper.

Sufficient reason appearing therefor, let service of a copy of this order and a copy of the papers on which it is granted upon Shaw, Esworthy, O'Brien & Crowley, attorneys for plaintiff, by leaving said copy at their office, or by personal service upon plaintiff School District by service upon any member of the Board of Education of plaintiff School District or the official Clerk of said School District, on or before 5 p.m. o'clock the 16th day of October, 1972, be deemed good and sufficient service upon plaintiff.

Dated: October 13, 1972
Binghamton, New York

ENTER

/s/ ROBERT O. BRINK
Justice of the Supreme Court

STATE OF NEW YORK, SUPREME COURT,

COUNTY OF BROOME.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Plaintiff-Respondent,

against

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY and JAMES TRASK,

Defendants-Appellants.

Index No. 102266.

State of New York,
County of Broome, ss:

BERNARD F. ASHE, being duly sworn deposes and says that:

1. Deponent is an attorney duly licensed to practice law in the State of New York and is one of the co-counsel for the defendant Susquehanna Valley Teachers Association and the individual defendants herein.

2. Deponent is familiar with the Order to Show Cause and Temporary Restraining Order signed by Mr. Justice Robert O. Brink dated October 11, 1972, and the papers upon which the same was based, a copy of which is attached hereto and made a part hereof. This affidavit is made in support of the aforesaid defendants' motion to vacate the said Order to Show Cause and Temporary

Restraining Order dated October 11, 1972, as being null and void *ab initio* on the basis of objections in point of law.

3. Article 63 of the Civil Practice Law and Rules (Section 6301) limits the granting of temporary restraining orders to situations "pending a hearing for a preliminary injunction where it appears immediate irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had."

4. Article 63 of the Civil Practice Law and Rules (Section 6313) further requires that "upon granting a temporary restraining order the court shall set the hearing for the preliminary injunction at the earliest possible time."

5. That the complaint and affirmation of Ernest R. Wheelock failed to set forth facts sufficient to show a threat of immediate or irreparable loss to the plaintiff or to state a proper cause of action.

6. That the relief sought by the complaint has already been granted and therefore the requirements of Article 63 of the Civil Practice Law and Rules have not been complied with in the issuance of the Temporary Restraining Order.

7. That the kind of injunctive relief envisioned by Section 211 of the Civil Service Law is a permanent injunction; and that no such relief has been requested in the complaint.

8. That the naked allegation of the violation of Section 210 of the Civil Service Law is not sufficient in and of itself to warrant the issuance of a temporary restraining order.

9. The plaintiff's unclean hands prevent the issuance of a temporary injunction.

10. That the aforesaid order of Mr. Justice Brink purports to limit the rights of defendants to speak freely; to peacefully assembly and to petition for the redress of grievances. These rights are protected against governmental interferences by the 1st and 14th Amendments to the Constitution and by the Constitution of the State of New York.

11. That for all of the foregoing reasons the Temporary Restraining Order is void *ab initio* and the complaint fatally defective as a matter of law.

12. That this matter is brought on by Order to Show and not by Notice of Motion because there is not sufficient time to serve the usual Notice of Motion.

13. No previous application has been made for the relief sought herein or for similar relief.

/s/ BERNARD F. ASHE

(Sworn to by Bernard F. Ashe Esq. on October 13, 1972.)

SUPREME COURT, U. S.

FILED

NOV 1 19

MICHAEL RODAK, JR., C

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—376

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Brief of Respondent in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

A. EDWARD HILL,
Attorney for Respondent,
724 Security Mutual Bldg.,
Binghamton, N. Y. 13901

HINMAN, HOWARD & KATTELL,
Of Counsel,
724 Security Mutual Building,
Binghamton, N. Y. 13901

SHAW, ESWORTHY, O'BRIEN & CROWLEY,
Of Counsel,
123 Front Street,
Binghamton, N. Y. 13905

Table of Contents.

	Page
Questions Presented	1
Statement of the Case	2
ARGUMENT:	
POINT I. The Supreme Court lacks jurisdiction under 28 U.S.C. 1257 (3) to review this case	6
A. The orders of the state courts do not fall within the standards of "finality" as enunciated by this Court	6
B. Pursuant to provisions of the New York Civil Practice Law and Rules, Petitioners would have further recourse to the state courts of New York, and, therefore, should not have petitioned the United States Supreme Court for a writ of certiorari until a "final" judgment and exhaustion of their state remedies	13
POINT II. The controversy between Petitioners and Respondent is moot and therefore not reviewable in this Court	15
POINT III. Petitioners have failed to present any issue with respect to violation of the First and Fourteenth Amendments to the United States Constitution worthy of review by this Court	20
A. The protection of the constitutional right of free speech does not extend to speech used ancillary to and in support of conduct which is intended to prevent effectuation of a valid state law	20

Page

B. The *Ex Parte* order issued below did not violate Petitioners' right of due process 25

Conclusion 28

APPENDIX 29

TABLE OF CASES.

Adderley v. Florida, 385 U. S. 39 (1966) 24

Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968) 9

Board of Education v. Teachers Local 886, 46 Ill. 2d 439, 264 N. E. 2d 18 (1970), cert. den. 403 U. S. 904 (1971) 25

Bond Stores, Inc. v. Turner, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dep't. 1941) 9

Carroll v. Commissioners of Princess Anne, 393 U. S. 175 (1968) 18, 19, 25

Central Hardware Co. v. NLRB, 407 U. S. 539 (1972) 23

City of New York v. DeLury, 23 N. Y. 2d 175, 295 N. Y. S. 901, 243 N. E. 2d 128 (1968) 27

Cox v. Louisiana, 379 U. S. 536 (1965) 24

Dause v. Bates, 369 F. Supp. 139 (W.D. Ky. 1973) 23

DeFunis v. Odegaard, 94 S. Ct. 1704 (1974) 16

Druggan v. Anderson, 269 U. S. 36 (1925) 27

Duryea v. Averbach, 164 App. Div. 44, 149 N. Y. S. 2d 432 (2nd Dep't. 1914) 14

Page

Eidelberg v. Steinberg, 6 A. D. 2d 895, 177 N. Y. S. 2d 544 (2nd Dep't. 1958) 14

Georgia Railway Power Co. v. Decatur, 262 U. S. 432 (1923) 8

Gibbons v. Ogden, 19 U. S. (6 Wheat) 448 (1821) 8

Giboney v. Empire Storage & Ice Co., 336 U. S. 490 (1949) 21, 24

Gospel Army v. Los Angeles, 331 U. S. 543 (1947) 7

Heublein, Inc. v. R. H. Macy and Co., Inc., 25 A. D. 2d 825 (1st Dep't. 1966) 14

Laborer's Local 438 v. Curry, 371 U. S. 542 (1963) 11

Lloyd Corp. v. Tanner, 407 U. S. 551 (1972) 23

Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952) 11, 12

Motor Coach Employees v. Missouri, 374 U. S. 74 (1963) 18

Musser v. Sheppard, 299 U. S. 513 (1936) 8

North Dakota Pharmacy Board v. Snyder's Stores, 94 S. Ct. 407 (1973) 7

Oilworkers Unions v. Missouri, 361 U. S. 363 (1960) 18

Organization for a Better Austin v. Keefe, 402 U. S. 415 (1971) 9, 15

Rankin v. Shanker, 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (1968) 26

Page

Richfield Oil Corporation v. State Board of Equalization, 329 U. S. 69 (1946) 7

State v. Fuller, 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dep't. 1968) 27

Super Tire Engineering Co. v. McCorkle, 94 S. Ct. 1694 (1974) 18

Teamsters Local 695 v. Vogt, 354 U. S. 284 (1957) 22, 23, 24

Thornhill v. Alabama, 310 U. S. 88 (1940) 21

Town of Albion v. Ryan, 201 App. Div. 717, 194 N. Y. S. 261 (4th Dep't. 1922) 14

Walker v. Birmingham, 388 U. S. 307 (1967) 19, 20

STATUTES.

United States Constitution

First Amendment 10

Fourteenth Amendment 10

28 United States Code

Section 1257 (3) 6, 8, 11

New York Civil Practice Law and Rules

Section 5704 28

Section 6301 27

Section 6314 ..... 13, 28

New York Civil Service Law

Section 210 (1) 2, 17, 22

Section 211 26

In The

Supreme Court of the United States

October Term, 1974.

No. 74-376.

Susquehanna Valley Teachers' Association, New York Congress of Teachers, Lynn H. Blanton, Patrick Tracy, Margaret Mulford, Thomas Malloy, and James C. Trask,

Petitioners,

v.

Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York,

Respondent.

Brief of Respondent in Opposition to Petition, for Writ of Certiorari to the Supreme Court of the State of New York, Appellate Division, Third Department.

Questions Presented.

1. Does the Supreme Court have jurisdiction to review this case?

(a) Is the Order of the State Appellate Court *final?*

(b) Have Petitioners exhausted their remedies in the State courts?

2. Is the controversy between Petitioners and Respondent moot and, therefore, not subject to review in this Court?

3. Were Petitioners' rights under the First and Fourteenth Amendments of the United States Constitution violated by the *ex parte* temporary restraining order and preliminary injunction, which prohibited certain conduct ancillary to and in support of an illegal strike on the school grounds?

Statement of the Case.

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.
>
> N. Y. Civil Service Law §210(1).

In the Fall of 1972, Respondent school district was charged with the responsibility of educating approximately 3,400 students from elementary through senior high school grades. The system functioned in five different school buildings, three elementary, one junior high and one senior high. The district comprised approximately sixty-five square miles. A total of 182 professionals were employed by Respondent, 160 of which were classified as classroom teachers. The individual Petitioners were and still are teachers in the system (Record, pp. 22, 23).

Negotiations for a collective bargaining agreement were pending between Petitioners and Respondent at the opening of the school year in September, 1972. On October 6, 1972, 130 of the teachers absented themselves from their classrooms without legal excuse and, between 7:00 a. m. and 6:00 p. m., proceeded to walk in front of the doorways and on the sidewalks and roadways adjacent to the schools. Most of the teachers were carrying signs (Record, pp. 28, 40).

The vice principal of the school district testified at a later hearing that, when the picketing was first observed, teachers were parading in large numbers in front of entrance doors to the senior high school, carrying posters or signs and making a circular marching line in front of the entrances. When the buses arrived, the pupils were held on the buses and the administration instructed the drivers to take the children home and not to pick up any other pupils. The schools did not open on that day (Record, pp. 52, 53).

October 6th was a Friday and the schools were not open on October 9th, the following Monday, because of a legal holiday. The schools were all closed on October 10th, to give the administration an opportunity to attempt to train substitute teachers. On that day, they discovered that keys had been taken or misplaced, equipment, such as bulbs for projectors, was missing, and class books could not be located (Record, pp. 22, 28, 29, 38).

When the schools were reopened on October 11th, the marching and picketing continued, and the vice principal observed teachers carrying signs and walking as close as ten to fifteen feet from classroom windows (Record, p. 54).

Under the authority of the New York State Civil Service Law (popularly known as the "Taylor Law") Respondent obtained an *ex parte* order to show cause, with temporary restraining order, which was signed and entered on October 11, 1972, by a New York State Supreme Court Justice (Appendix I, Petitioners' Brief, at 50). The order provided for a hearing, seven days thereafter, on October 18, 1972, to entertain arguments as to whether a preliminary injunction should be granted to Respondent,

enjoining Petitioners from engaging in a strike which Petitioners admit was illegal under the Civil Service Law, and from marching and picketing. The temporary restraining order prohibited Petitioners from striking,

> from marching on the schoolgrounds of said school district during normal class hours, 7:45 a. m. to 3:35 p. m. on Monday through Friday; from intimidating, coercing or in any way interfering with the free passage of other persons not engaged in said strike from passing at will freely and without interference to and from the school buildings of said school district; from contacting in person or by phone those persons employed by the district or who voluntarily or otherwise are assisting Plaintiff in carrying out its lawful duties of maintaining school, pending the argument of this motion.

On October 13, Petitioners obtained an order to show cause why the order granting the temporary restraining order should not be vacated, which was returnable on October 18, the date scheduled for the injunction hearing. In the affidavits accompanying their show cause order, Petitioners stated that their First and Fourteenth amendment rights had been violated (Appendix J, Petitioners' Brief, at 53). The striking, marching and picketing continued on October 13, 16 and 17 (Record, pp. 28, 40).

Throughout the first days of the strike and as a result of the picketing, Respondent experienced difficulty in the delivery of milk and bread. On one occasion, a boiler repairman refused to enter the building to make an emergency repair until his union superior was finally persuaded to let him cross the picket line (Record, p. 55). The administration was unable to obtain deliveries of gas and oil to their physical plants during normal workday hours (Record, p. 57).

At the hearing, Respondent called five witnesses and introduced in evidence professional photographs and a motion picture, tending to prove the existence of the strike, marching and picketing. Petitioners called no witnesses.

When the evidence was closed, the court entertained oral motions and then issued a decision from the bench, denying Petitioners' motion to vacate the *ex parte* order and temporary restraining order. In the process of deciding Petitioners' motion to vacate the temporary restraining order, the court asked counsel: "Wouldn't it be a matter of common sense that it was incidental to the strike?" The court was referring to the conduct of picketing, marching, etc., which is at issue herein (Record, p. 5). The court further granted a "temporary" (preliminary would be the technically proper word) injunction against Petitioners, prohibiting them from striking and engaging in other specified ancillary conduct.

The order of October 19 giving effect to the preliminary injunction prohibited the Petitioner teachers:

> From marching, and from picketing on the school grounds of the Plaintiff's School District on Monday through Friday from 7:45 a. m. to 3:35 p. m.; from intimidating, coercing or in any way interfering with the free passage of students and other persons not engaged in striking from passing at will freely and without interference to and from the school buildings of the said Plaintiff's School District; from coercing in person or by phone those persons employed by the District or who voluntarily or otherwise are assisting the Plaintiff School Board in carrying on its lawful duties of maintaining school (Appendix F, Petitioners' Brief, at 37).

On or about November 1, Petitioners executed a contract with Respondent and the teachers all returned to work on November 2. Although these facts do not appear in the record, they are submitted by Respondent in support of its contention that the matter is moot (Point II, below).

Petitioners then appealed to the Appellate Division, Third Department, New York State Supreme Court, from so much of the order of Justice Brink which granted the motion for a preliminary injunction (Petitioners' Brief, at 42). Prior to taking the appeal to the Appellate Division, Petitioners never made a motion in any State Court to vacate the preliminary injunction.

Petitioners then attempted to seek leave to appeal to the Court of Appeals of the State of New York but permission was denied by the Appellate Division.

A subsequent motion addressed directly to the Court of Appeals was dismissed "upon the ground that the order sought to be appealed from *does not finally determine the action* within the meaning of the constitution." (Emphasis supplied.) (Petitioners' Brief, at 31.)

ARGUMENT.

POINT I.

The Supreme Court lacks jurisdiction under 28 U.S.C. 1257 (3) to review this case.

A. The orders of the state courts do not fall within the standards of "finality" as enunciated by this Court.

In determining the "finality" of judgments for purposes of review, this Court has *frequently stated* the following rule:

> [F]or a judgment of an appellate court to be final and reviewable for this purpose, it must end the litigation by fully determining the rights of the parties, so that nothing remains to be done by the trial court 'except the ministerial act of entertaining the judgment which the appellate court • • • directed.' *Department of Banking v. Pink*, 317 U. S. 264, 267, • • •.
> *Gospel Army v. Los Angeles*, 331 U. S. 543 (1947) at 546.

See also *Richfield Oil Corporation v. State Board of Equalization*, 329 U. S. 69 (1946).

Although this Court has stated that it will look beyond the "face of the judgment" to determine whether the state court proceeding was final, Respondent will show that the state court orders in this case clearly lack this vital element (*Gospel Army, id.* at 548).

In dismissing Petitioners' motion for leave to appeal, the New York Court of Appeals stated (Petitioners' Brief for Certiorari at 30):

> That the said motion be and the same hereby is dismissed upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution.

That statement leaves no doubt that the order for which Petitioners seek certiorari lacked finality under the court's definition of the term. Indeed, this record will be searched in vain for any "judgment," as that term is understood in common practice. All of the state court rulings were effectuated by intermediate orders.

In a recent decision, *North Dakota Pharmacy Board v. Snyder's Stores*, 94 S. Ct. 407 (1973), this Court stated at 410:

The finality requirement of 28 U. S. C. Section 1257 (28 U. S. C. S. Section 1257) which limits our review of state court judgments serves several ends: (1) it avoids piecemeal review by federal courts of state court decisions; (2) it avoids giving advisory opinions in cases where there may be no real "case" or "controversy" in the sense of Art. III; (3) it limits federal review of state court determinations of federal constitutional issues to leave at a minimum federal intrusion in state affairs.

Respondent submits that a grant of certiorari in this case would be in derogation of each of the foregoing criteria. First, Petitioners' attack is focused upon a temporary restraining *order* of October 11th, 1972, issued by a motion term judge, and an *order* of the same court, dated October 19th, 1972, which granted a *preliminary* injunction. Second, as is discussed in Point II, there is no longer any real "case" or "controversy" "in the sense of Article III," since Petitioners have since entered into a collective bargaining agreement and returned to work. Third, Petitioners should have obtained that type of state court determination which is based upon the state's own purposeful, appellate "sifting" process before attempting to present Federal questions to this tribunal.

This Court in the past has held the granting of a preliminary injunction or interlocutory order to be non-final for purposes of review under 28 U. S. C. §1257. *Gibbons v. Ogden*, 19 U. S. (6 Wheat.) 448 (1821); *Georgia Railway Power Co. v. Decatur*, 262 U. S. 432 (1923); *Musser v. Sheppard*, 299 U. S. 513 (1936).

While, on occasion, the Court has held the granting or denial of an injunction to be final for purposes of review, Respondent submits that this case does not fall within any of the recognized exceptions.

In *Organization for a Better Austin v. Keefe*, 402 U. S. 415 (1971), the Court, in a footnote, dealt briefly with the question of its power to review a "temporary injunction" issued against defendants, enjoining them from the distribution of leaflets. The Court stated, at 402 U. S. 418, that nothing in the record

> would indicate that the Illinois courts applied a less rigorous standard in issuing and sustaining this injunction than they would with any permanent injunction in the case. Nor is there any indication that the injunction rests on a disputed question of fact that might be resolved differently upon further hearing. Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality. Moreover, the temporary injunction here, which has been in effect for over three years, has already had marked impact on Petitioners' First Amendment rights.

In contrast, under the law of New York State, the granting of a temporary injunction does not decide the question as to plaintiff's right to a permanent injunction, although it is a factor to be considered. As stated by the appellate division in *Bond Stores, Inc., v. Turner*, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941), a case which has been cited as the law of the State:

> [T]he granting of a temporary injunction does not decide the question as to plaintiff's right to a permanent injunction. The temporary injunction merely maintained the *'status quo'* until the merits of the case might be passed upon. The parties should have their day in court as to those merits. 262 App. Div. 417, 419; 29 N. Y. S. 2d 82, 84.

In *Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza*, 391 U. S. 308 (1968), the Court was

asked to consider whether a state court's injunction of peaceful picketing as a trespass was violative of Petitioner's rights under the First and Fourteenth Amendments of the U. S. Constitution. In dealing with the question of the nature of the injunction, the Court stated at 391 U. S. 312, n. 5:

> We need not concern ourselves with deciding whether the injunction is to be characterized as permanent or temporary. Since the order provides in terms that it shall remain in effect until further modification by the court and since there is no indication that any modification affecting the issues presently before us will be forth-coming at any time in the near future, the judgment below upholding the issuance of the injunction is clearly final for purposes of review by this Court. Compare *Construction Laborers' Local 438 v. Curry*, 371 U. S. 542, 9 L. Ed. 2d 514, 83 S. Ct. 531 (1963).

In the present case, the order (printed in Petitioners' Brief for Certiorari, at 39) specifically states:

> That *pending the final determination of this action*, the court hereby grants a temporary injunction against the Susquehanna Valley Teachers' Association * * * (Emphasis supplied.)

As the discussion in Point IB indicates, under the law of New York State, Petitioners had recourse to obtain either a final determination of this matter or, in the alternative, to have the temporary injunction vacated on the grounds of lack of prosecution. We submit, therefore, that the order not only lacks "finality" for purposes of review by this Court, but also that Petitioners still have available remedies in the state courts of New York.

To further support this contention Respondent refers to two other cases involving preliminary injunctions. In

Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952), the Court dismissed a writ of certiorari improvidently granted to review a "temporary injunction," stating at 344 U. S. 181-182:

> True, as long as a temporary injunction is in force, it may be as effective as a permanent injunction, and for that reason appeals from interlocutory judgments have been authorized by state legislatures and Congress. But such authorization does not give interlocutory judgments the aspect of finality here, even though we may have inadvertently granted certiorari * * *.
>
> It is argued that if this is not held to be a final decree or judgment and decided now, it may never be decided, because to await the outcome of the final hearing is to moot the question and to frustrate the picketing. *However appealing such argument may be, it does not warrant us in enlarging our jurisdiction.* Only Congress may do that. *Furthermore, the interlocutory decree could have been readily converted into a final decree, and the appeal could have proceeded without question as to jurisdiction just as effectively and expeditiously as the appeal from the interlocutory injunction was pursued in this case.* (Emphasis supplied.)

In *Laborer's Local 438 v. Curry*, 371 U. S. 542 (1963), the Court held that the Georgia State courts lacked jurisdiction to consider the application for a temporary injunction because the activities involved were within the exclusive jurisdiction of the N.L.R.B. In discussing the "finality" requirement of 28 U. S. C. §1257, the Court said, at 371 U. S. 550 and 552:

> The policy of 28 U. S. C. §1257 against fragmenting and prolonging litigation and against piecemeal reviews of state court judgments does not prohibit our holding the decision of the

> Georgia Supreme Court to be a final judgment, particularly when postponing review would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard *by the National Labor Relations Board, not by the state courts* * * *. (Emphasis supplied.)
>
> There remains the matter of *Montgomery Bldg. & Constr. Trades Council v. Ledbetter Erection Co.*, 344 U. S. 178, 97 L. Ed. 204, 73 S. Ct. 196, where the Court applied the salutary and long-standing rule that decisions upon interlocutory injunctions are not final judgments. *Ledbetter*, of course, was decided before *Garner v. Teamsters, C. & H. Local Union*, 346 U. S. 485, 98 L. Ed. 228, 74 S. Ct. 161, and subsequent pre-emption cases in this Court, and at a time when the respective jurisdiction of the National Labor Relations Board and the state courts was a much mooted issue * * *.
>
> In any event, however, to the extent that *Ledbetter* may be said to prohibit our review of a final and erroneous assertion of jurisdiction by a state court to issue a temporary injunction in a labor dispute, when a substantial claim is made that the jurisdiction of the state court is pre-empted by federal law and by the exclusive power of the National Labor Relations Board, we decline to follow it.

The above-quoted language establishes that *Ledbetter* remains controlling in the present case. The temporary injunction in the case at bar does not arise within the framework of a labor dispute governed by federal law. Consequently, a refusal by this Court to review the case would not erode, or affect in any manner, the national labor policy which was relevant in *Curry, supra.*

B. Pursuant to provisions of the New York Civil Practice Law and Rules, Petitioners would have further recourse to the state courts of New York, and, therefore, should not have petitioned the United States Supreme Court for a writ of certiorari until a "final" judgment and exhaustion of their state remedies.

Article 63 of the Civil Practice Law and Rules of New York contains detailed, extensive provisions regarding the issuance of preliminary injunctions and temporary restraining orders. Section 6314 specifically sets forth a procedure for motions to vacate or modify such orders (Respondent's Appendix, 29). While a motion under CPLR 6314 to vacate a preliminary injunction is addressed to the discretion of the court, New York State case law establishes many grounds upon which the court will entertain such a motion.

Petitioners did obtain an order to show cause to vacate Respondent's *ex parte* temporary restraining order and to dismiss the complaint which was heard on October 18, 1972, the date on which the hearing for the preliminary injunction was also held. The lower court denied that motion. However, Petitioners never moved to vacate or modify the preliminary injunction, pursuant to the established procedural laws of New York State.

As stated in a recognized treatise on procedure, 7A Weinstein-Korn-Miller, *New York Civil Practice,* Paragraph 6314.08 (1973 Rev.) at page 63-169:

> In many instances, the defendant will not be entitled to a vacation of the injunction or restraining order but will be entitled to partial relief, which will take the form of a modification. One situation in which this type of relief will be appropriate is when the plaintiff has shown a need

> for a preliminary injunction but not for a preliminary injunction that is as broad as the injunction actually issued.

See *Town of Albion v. Ryan,* 201 App. Div. 717, 194 N. Y. S. 261 (4th Dept. 1922); *Eidelberg v. Steinberg,* 6 A. D. 2d 895, 177 N. Y. S. 2d 544 (2nd Dept. 1958). In *Heublein, Inc., v. R. H. Macy and Co., Inc.,* 25 A. D. 2d 825 (1st Dept. 1966), the Appellate Division stated:

> Independent of any reservation or fixing of conditions in the temporary injunction order, the power is expressly conferred upon the court to vacate or modify the order upon a change of circumstances (CPLR 6314), * * * Any application to vacate or modify the order should be considered and determined in light of all the circumstances then existing and after full opportunity of the parties to be heard thereon, and we conclude that it was improper now to particularize conditions which could have the effect of foreclosing or improperly influencing the future exercise of the court's discretion. *In the meantime, the parties should press for an early trial.* (Emphasis supplied.)

As an alternative to moving for *modification,* as pointed out by the above-quoted court, petitioners had the option of moving to *vacate* the preliminary injunction or to serve an answer and file a note of issue to have the case determined on the merits. As stated by the Appellate Division in *Duryea v. Auerbach,* 164 App. Div. 44, 149 N. Y. S. 432 (2nd Dept. 1914), a case frequently cited for the following proposition:

> The general rule in this court is not to disturb this kind of an order [an injunction *pendente lite*]. (* * * citing cases * * *) On the other hand, the plaintiff, having thus halted the defendants, should not be allowed to rest. And if he is not ready for

> trial at the first possible moment, the defendant should be heard for a vacation of this order, which is now affirmed, * * *

Unlike the injunctions which this court was asked to consider in *Organization for a Better Austin v. Keefe, supra,* and *Logan Valley, supra,* the injunction in this case was clearly a temporary injunction, "pending the final determination of this action" (Order of October 19, 1972, Petitioners' Brief for Certiorari at 39). In contrast to the injunction in the *Logan Valley* case, *supra,* this order did not specifically provide that it would remain in effect until further modification. And, as above indicated, the refusal of the Court of Appeals of New York State to hear argument on the merits of this case was premised "upon the ground that the order sought to be appealed from does not finally determine the action within the meaning of the Constitution" (Petitioners' Brief for Certiorari at 30).

Respondent therefore submits that the order which Petitioners now ask the Supreme Court to void lacks "finality" for purposes of review under 28 U. S. C. §1257, and that Petitioners have failed to pursue available state court remedies.

POINT II.

The controversy between Petitioners and Respondent is moot and therefore not reviewable in this Court.

The activities of Petitioners, which provoked the orders which they now challenge, arose on October 6, 1972, when they commenced their strike, in violation of the New York Civil Service Law. The strike terminated on November 1, 1972, when a collective bargaining agreement

was entered into between the Susquehanna Valley Teachers' Association and the Respondent. The teachers returned to work on November 2, 1972, and have continued to work since that date.

In light of the execution of the collective bargaining agreement, and the teachers' return to work approximately two years ago, Respondent contends that the case is moot and should not be considered by the Court.

The Court has consistently applied the principle "that federal courts are without power to decide questions that cannot affect the rights of the litigants before them." *DeFunis v. Odegaard,* 94 S. Ct. 1704 at 1705 (1974). In *DeFunis,* the Court concluded at 1706:

> DeFunis did not cast his suit as a class action, and the only remedy he requested was an injunction commanding his admission to the Law School. He was not only accorded that remedy, but he now has also been irrevocably admitted to the final term of the final year of the Law School course. The controversy between the parties has thus clearly ceased to be 'definite and concrete' and no longer 'touches the legal relations of parties having adverse legal interests'.

There is no longer any controversy between the parties involved in this litigation. The underlying dispute involved the parties' efforts to negotiate a collective bargaining agreement covering the terms and conditions of employment for the teachers in the Susquehanna Valley Central School District. Such an agreement was reached, and on November 2, 1972, the teachers returned to work.

The Court in *DeFunis* also concluded:

> It might also be suggested that this case presents a question that is 'capable of repetition, yet evading

> review' (citations omitted), and is thus amenable to federal adjudication even though it might otherwise be considered moot. But *DeFunis* will never again be required to run the gantlet of the Law School's admissions process, and so the question is clearly not 'capable of repetition' so far as he is concerned. Moreover, just because this particular case did not reach the Court until the eve of the petitioner's graduation from law school, it hardly follows that the issue he raises will in the future evade review. If the admissions procedures of the Law School remain unchanged, there is no reason to suppose that a subsequent case attacking those procedures will not come with relative speed to this Court, now that the Supreme Court of Washington has spoken. This case, therefore, in no way presents the exceptional situation in which the *Southern Pacific Terminal* doctrine might permit a departure from 'the usual rule in federal cases * * * that an actual controversy must exist at stages of appellate or certiorari review, and not simply at the date the action is initiated'. (Citations omitted.) 94 S. Ct. at 1707.

The same rationale applies in the present case. The situation which existed in 1972 is not "capable of repetition" unless Petitioners engage in another illegal strike. The New York Civil Service Law continues to prohibit strikes by public employees. Civil Service Law, Sec. 210(1). In the absence of an illegal strike, the issue will never recur. In a case involving a labor dispute this Court has stated:

> The decision we are asked to review upheld only the validity of an injunction, an injunction that expired by its own terms more than three years ago. Any judgment of ours at this late date "would be wholly ineffectual for want of a subject matter on which it could operate. An affirmance would ostensibly require something to be done which had already taken place. A reversal would ostensibly avoid an event which had already passed beyond

> recall. One would be as vain as the other. To adjudicate a cause which no longer exists is a proceeding which this Court uniformly has declined to entertain". (Citation omitted.) *Oil Workers Unions v. Missouri*, 361 U. S. 363 (1960) at 371.

The importance of the existence of a continuing dispute has been consistently recognized by the Court. In *Motor Coach Employees v. Missouri*, 374 U. S. 74 (1963), the Court held that the issue was not moot because the labor dispute remained unresolved.

The same principle was confirmed in *Carroll v. Commissioners of Princess Anne*, 393 U. S. 175 at 178 (1968). In that case the Court cited *Motor Coach Employees v. Missouri, supra*, and stated:

> • • • [A]lthough the seizure (of the bus company by the State of Missouri) had been terminated, the case was not moot because "the labor dispute (which gave rise to the seizure) remains unresolved. There thus exists • • • not merely the speculative possibility of invocation of the (seizure law) in some future labor dispute, but the presence of an existing unresolved dispute which continues • • •."

In *Super Tire Engineering Co. v. McCorkle*, 94 S. Ct. 1694 (1974), the Court held that the issue was not moot even though the labor dispute had been resolved, because a state statute immediately and directly continued to affect the bargaining relationship of the parties.

In the case at bar, however, the labor dispute has been resolved by the execution of a collective bargaining agreement which became effective on November 2, 1972. Moreover, since Petitioners concede that their strike was unlawful, there is here no challenged state statute which continues to affect the bargaining relationship of the parties. Consequently, Petitioners' claim involves not an actual

controversy, but only a speculative possibility that they would again violate the statute.

Another important factor in *Carroll v. Commissioners of Princess Anne, supra,* was specifically pointed out by the Court concerning the issue of mootness. The Court stated:

> We agree with petitioners that the case is not moot. Since 1966, petitioners have sought to continue their activities, including the holding of rallies in Princess Anne and Somerset County, and it appears that the decision of the Maryland Court of Appeals continues to play a substantial role in the response of officials to their activities.
>
> • • • This conclusion—that the question is not moot and ought to be adjudicated by this Court—is particularly appropriate in view of this Court's decision in *Walker v. Birmingham,* 388 U. S. 307 (1967). In that case, the Court held that demonstrators who had proceeded with their protest march in face of the prohibition of an injunctive order against such a march, could not defend contempt charges by asserting the unconstitutionality of the injunction. *The proper procedure, it was held, was to seek judicial review of the injunction and not to disobey it, no matter how well founded their doubts might be as to its validity.* Petitioners have here pursued the course indicated by *Walker;* and in view of the continuing vitality of petitioners' grievance, we cannot say that their case is moot. 393 U. S. at 178-179. (Emphasis supplied.)

In the case at bar, the state court orders ceased to have an effect upon the Petitioners on November 2, 1972, when the teachers returned to work. More importantly, notwithstanding this Court's decision in *Walker v. Birmingham, supra,* Petitioners in this case disobeyed the temporary restraining order and the preliminary injunction and continued, until November 2, 1972, to participate in the

illegal strike and the related activities which were an integral part of the illegal strike. In summary, none of the circumstances which enhanced the position of petitioners in *Carroll* are present in this case. The action by Respondent was necessitated by Petitioners' violation of New York law; and Petitioners then disobeyed two orders of the New York Supreme Court for a period of approximately nineteen days.

Unlike the petitioners in *Carroll,* Petitioners here did not "pursue the course indicated by *Walker v. Birmingham*", and for that reason together with the fact that the underlying dispute was resolved approximately two years ago, the case should be considered moot.

POINT III.

Petitioners have failed to present any issue with respect to violation of the First and Fourteenth Amendments to the United States Constitution worthy of review by this Court.

A. The protection of the constitutional right of free speech does not extend to speech used ancillary to and in support of conduct which is intended to prevent effectuation of a valid state law.

Petitioners contend that the *ex parte* temporary restraining order and the order granting a preliminary injunction abridged their right of free speech. In particular, they contend that such orders were overly broad in that they not only enjoined unlawful activity but also enjoined speech used ancillary to and in direct support of such unlawful activity. Respondent respectfully submits that this claim is wholly specious.

In support of their claim, Petitioners note that picketing, as a mode of free speech, was approved in *Thornhill v. Alabama,* 310 U. S. 88 (1940). However, they fail to cite subsequent decisions of this Court which have significantly limited *Thornhill's* general pronouncements.

In *Giboney v. Empire Storage & Ice Co.,* 336 U. S. 490 (1949), for example, the Court was presented with questions concerning the constitutional power of a state to apply its antitrade restraint law to labor union activities, and to enjoin union members from peaceful picketing carried on as an essential and inseparable part of a course of conduct which was in violation of a state law. In affirming an order of the lower court enjoining peaceful picketing, this Court rejected the notion that constitutional freedom of speech extends to speech used as an integral part of conduct in violation of a valid criminal statute. In balancing the state interest with the essential importance of free speech, this Court, speaking through Mr. Justice Black, stated at 336 U. S. 592:

> • • • The placards were to effectuate the purposes of an unlawful combination, and their sole, unlawful immediate objective was to induce Empire to violate the Missouri law by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers. It is true that the agreements and course of conduct here were as in most instances brought about through speaking or writing. But it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written or printed. (Citations omitted.) Such an expansive interpretation of the constitutional guarantees of speech and press would make it practically impossible ever to enforce laws against agreements in restraint of trade as well as many other agreements and conspiracies deemed injurious to society.

Noting that the petitioners would succeed in making the state policy a dead letter, unless restrained, this Court ruled that picketing could be regulated or prohibited to the extent that it forms an essential part of a course of conduct which the state can regulate or prohibit.

In *Teamsters Local 695 v. Vogt,* 354 U. S. 284 (1957), the Court broadened its holding in *Giboney, supra,* by ruling that a state may enjoin peaceful picketing where such conduct is in violation of a valid policy of the state. In that case, the Court was asked to rule on the constitutionality of an order enjoining peaceful picketing, where such conduct was engaged in for the purpose of coercing an employer to interfere with its employees in their right to join or refuse to join a union. Such interference on the part of an employer was barred by a valid state statute.

The Court reviewed a line of its post-*Thornhill* decisions, observing that even peaceful picketing is subject to proper state regulation.

> This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy. 354 U. S. 284 at 293.

In the case at bar, Petitioners have not challenged Section 210(1) of the New York Civil Service Law which provides:

> No public employee or employee organization shall engage in a strike, and no public employee or employee organization shall cause, instigate, encourage, or condone a strike.

No party here denies that Petitioners, individually and jointly, engaged in picketing ancillary to and in direct support of a strike in violation of that statute. In view of the *Vogt* case, *supra,* it is clear that picketing and other conduct, aimed at preventing effectuation of a valid state law, may be enjoined. See, also, *Central Hardware Co. v. N.L.R.B.,* 407 U. S. 539 (1972), and *Lloyd Corp. v. Tanner,* 407 U. S. 551 (1972). Indeed, since the conduct ceased when Petitioners ended their unlawful strike, thereby leaving no doubt that such conduct was an integral and inseparable part of the strike, Respondent contends that the picketing and other conduct could be enjoined under the narrower *Giboney* holding.

Nevertheless, Petitioners, relying on *Dause v. Bates,* 369 F. Supp. 139 (W. D. Ky. 1973), and the cases cited therein, contend that the orders issued below violated their constitutional right of free speech. Such reliance is misplaced. In the *Dause* case, *id.,* three principals and four teachers were demoted or terminated allegedly because they supported a teachers' strike which was later found to be unlawful by the Kentucky Court of Appeals. However, none of the principals went out on strike nor were any of the plaintiffs engaged in picketing or coercion. Also, three of the teachers were found to have been terminated for reasons unrelated to the strike. With respect to the remaining four, the court found that they were *demoted or discharged because of their comments or writings in support of the strike* and held that such action violated their constitutional right of free speech.

Unlike the circumstances in the *Dause* case, *id.,* Petitioners herein participated in a strike that was clearly prohibited by statute. In addition, Petitioners engaged in picketing and other conduct in direct support of that strike. In spite of this, Respondent did not prevent any of the Petitioners employed by it from returning to their

regular duties when the collective bargaining agreement was executed.

This Court has long held that picketing cannot be equated with "pure speech". In *Cox v. Louisiana,* 379 U. S. 536 (1965), for example, the Court stated at 555:

> We emphatically reject the notion urged by appellant that the First and Fourteenth Amendments afford the same kind of freedom to those who would communicate ideas by conduct such as patrolling, marching, and picketing on streets and highways, as these amendments afford to those who communicate ideas by pure speech.

Similarly, in *Adderley v. Florida,* 385 U. S. 39 (1966), the Court stated at 47-48:

> • • • there is no merit to petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate • • •" Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. That concept of constitutional law was vigorously and forthrightly rejected in two of the cases petitioners rely on, • • • We reject it again.

In view of the holdings in *Giboney, Vogt, Cox, and Adderly,* Respondent contends that the constitutional right of free speech cannot be used by Petitioners as a cloak for speech used in support of and as an inseparable part of an unlawful strike.

B. The *Ex Parte* order issued below did not violate Petitioners' right of due process.

Petitioners claim that the *ex parte* order issued below violates their right of due process under the Fourteenth Amendment. In support of this contention, Petitioners rely primarily upon *Carroll v. Commissioners of Princess Anne,* 393 U. S. 175 (1968), *supra,* in which this Court held that an *ex parte* order restraining petitioners for ten days from holding rallies or meetings in the county was unconstitutional. That case involved a planned rally where political speeches were to be delivered. Since a rally held by petitioners on the prior day aroused considerable unrest, the lower court issued an *ex parte* order restraining petitioners from holding any other rallies or meetings for ten days. Petitioners obeyed the order.

Unlike the *Carroll* case, the case at bar involved picketing and other conduct in support of an illegal strike. As already noted in *Cox, supra,* and *Adderly, supra,* picketing cannot be equated with the pure speech involved in *Carroll.* In addition, Respondent demonstrated to the satisfaction of both courts below that the unlawful strike and related activity were causing irreparable harm. Such harm resulted not only from the loss of services of Petitioners employed by Respondent but also because of the stoppage of delivery of essential goods and services to the schools and disruption of normal class activities. Finally, it should be noted that Petitioners here defied the order, rather than judicially challenging such order.

In view of the above, Respondent contends that *Carroll, supra,* does not apply to the case at bar. See *Board of Education v. Teachers Local 886,* 46 Ill. 2d 439, 264 N. E. 2d 18 (1970), cert. den. 403 U. S. 904 (1971). As the *Carroll* case, *supra,* recognizes, there are situations which justify the issuance of *ex parte* restraining orders of short duration.

It should be noted that Section 211 of the N. Y. Civil Service Law (The Taylor Law) specifically provides:

> Notwithstanding the provisions of section eight hundred seven of the labor law, where it appears that public employees or an employee organization threaten or are about to do, or are doing, an act in violation of section two hundred ten of this article, the chief executive officer of the government involved shall (a) forthwith notify the chief legal officer of the government involved, and (b) provide such chief legal officer with such facilities, assistance and data as will enable the chief legal officer to carry out his duties under this section and, notwithstanding the failure or refusal of the chief executive officer to act as aforesaid, *the chief legal officer of the government involved shall forthwith apply to the supreme court for an injunction against such violation.* (Emphasis supplied.)

Respondent submits that the italicized words embody a legislative mandate that the chief legal officer avail himself of the most prompt procedure in restraining unlawful activity. As was stated by the New York Court of Appeals in *Rankin v. Shanker,* 23 N. Y. 2d 111, 295 N. Y. S. 2d 625, 242 N. E. 2d 802 (1968), a case in which the question presented was whether public employees or the representative unions were entitled, as a matter of right, to a trial by jury in criminal contempt proceedings brought against them for violation of the Taylor Law:

> It is not unreasonable to assume that the Legislature, which prohibited strikes by public employees, would provide every reasonable means for enforcement of that prohibition by giving the courts the powers necessary to bring about their early termination. * * * And, we would add, if called by teachers in the New York City public school system, such strikes would not only deprive children of their fundamental and statutory right to a basic education—thereby severely handicapping them in their efforts to obtain higher education and future

> employment—but it would also impair their respect for law. 23 N. Y. 2d 111 at 117-18, 295 N. Y. S. 2d 625 at 630, 242 N. E. 2d 802 at 806.

See also, *City of New York v. DeLury,* 23 N. Y. 2d 175, 295 N. Y. S. 2d 901, 243 N. E. 2d 128 (1968), appeal dismissed 394 U. S. 455 (1969); *State v. Fuller,* 31 A. D. 2d 71, 296 N. Y. S. 2d 37 (2nd Dep't 1968).

Respondent further relies upon a statement of this Court in *Druggan v. Anderson,* 269 U. S. 36 (1925), which involved the construction of a section of the National Prohibition Act. The Court stated at 40:

> It is argued that the preliminary injunction was void for want of the notice required by Equity Rule 73 and the Act of October 15, 1914, chap. 323, §17, 38 Stat. at L. 730, 737, Comp. Stat. §1243a, 6 Fed. Stat. Anno. 2d ed. p. 139. The statute provides that if it is made to appear that the nuisance exists, a *temporary injunction shall issue forthwith.* §22. In view of the drastic policy of the Amendment and the statute, *we see no reason why the words should not be taken literally to mean what they say.* (Emphasis supplied.)

In view of the overriding governmental interest embodied in the Taylor Law, Respondent submits that the words of this statute should also be read literally, particularly since the speech which was temporarily enjoined was used in direct support of an unlawful strike.

The N. Y. Civil Practice Law and Rules afford ample procedural safeguards against abuse in the issuance of a temporary restraining order. Section 6301 states:

> A temporary restraining order may be granted pending a hearing for a preliminary injunction where it appears that immediate and irreparable injury, loss or damage will result unless the defendant is restrained before the hearing can be had.

Section 6314 provides for immediate vacatur or modification, *ex parte,* before either the judge who granted it or, in his absence, another judge. Section 5704 similarly provides that the appellate division or a justice thereof may vacate or modify any such order without notice to the adverse party. As noted above, instead of relying upon these procedural safeguards, Petitioners *defied* the temporary restraining order issued in accordance with the provisions of New York State procedural law.

Conclusion.

Respondent respectfully submits that the Court should deny the petition for writ of certiorari upon all of the grounds raised above.

Dated: October 28, 1974.

Respectfully submitted,

A. EDWARD HILL,
Attorney for Respondent,
724 Security Mutual Building,
Binghamton, N. Y. 13901
Telephone: (607) 723-5341.

HINMAN, HOWARD & KATTELL,
Of Counsel,
724 Security Mutual Building,
Binghamton, N. Y. 13901
Telephone: (607) 723-5341.

SHAW, ESWORTHY, O'BRIEN & CROWLEY,
Of Counsel,
123 Front Street,
Binghamton, N. Y. 13905
Telephone: (607) 723-5408.

APPENDIX.

APPENDIX A—STATUTORY PROVISIONS

N. Y. Civil Practice Law and Rules

§6314. Vacating or modifying preliminary injunction or temporary restraining order.

A defendant enjoined by a preliminary injunction may move at any time on notice to the plaintiff to vacate or modify it. On motion, without notice, made by a defendant enjoined by a temporary restraining order, the judge who granted it, or in his absence or disability, another judge, may vacate or modify the order. An order granted without notice and vacating or modifying a temporary restraining order shall be effective when together with the papers upon which it is based, it is filed with the clerk and served upon the plaintiff. As a condition to granting an order vacating or modifying a preliminary injunction or a temporary restraining order, a court may require the defendant, except where the defendant is a public body or officer, to give an undertaking, in an amount to be fixed by the court, that the defendant shall pay to the plaintiff any loss sustained by reason of the vacating or modifying order.

SUPREME COURT, U. S
NOV 10
MICHAEL RODAK, JR.,

IN THE

Supreme Court of the United States

October Term, 1974.

No. 74—376.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Brief of Petitioners in Reply to Opposing Brief of Respondent, Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York.

BERNARD F. ASHE,
Attorney for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205

JAMES R. SANDNER,
ROCCO A. SOLIMANDO,
IVOR R. MOSKOWITZ,
Of Counsel,
80 Wolf Road,
Albany, N. Y. 12205

Table of Contents.

	Page
Statement	1
POINT I. The action of the Appellate Division, Third Department, as a practical matter, did finally determine the action between the parties and is therefore reviewable by this Court under 28 U.S.C. Section 1257(3)	2
POINT II. The controversy presented herein is not moot, but still in active litigation	6
POINT III. Merely because a state may act to enjoin picketing in connection with the alleged violation of a state law does not give either that state or its courts the right to extend injunctive relief in such a manner as to chill the exercise of First Amendment freedoms	8
POINT IV. The temporary restraining order and preliminary injunction granted against petitioners was void under New York law	9
CONCLUSION. For the reasons cited in petitioners' petition for a writ of certiorari and those cited herein, this Court should grant certiorari	12

TABLE OF CASES.

	Page
Adderley v. Florida, 385 U. S. 39 (1966)	8, 9
Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968)	4, 5
American Radio Assn. v. Mobile Steamship Assn., Inc., No. 73-748, cert. granted 2/25/74	6
Bond Stores, Inc., v. Turner, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941)	4
Cox v. Louisiana, 379 U. S. 536 (1965)	8, 9
DeFunis v. Odegaard, U. S. , 94 S. Ct. 1704 (1974)	7
Giboney v. Empire Storage and Ice Co., 336 U. S. 490 (1949)	8
Laborer's Local 438 v. Curry, 371 U. S. 542 (1963)	5
Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc., 344 U. S. 178 (1952)	5
Organization For a Better Austin v. Keefe, 402 U. S. 415 (1971)	4, 5
Steffel v. Thompson, U. S. , 39 L. Ed. 2d 505 (1974)	7
Teamsters Local 695 v. Vogt, 354 U. S. 284 (1957)	8

AUTHORITIES.

UNITED STATES STATUTES:

Page

28 U.S.C.:

Section 1257(3) 2

United States Constitution:

First Amendment 7, 8

NEW YORK STATUTES:

New York Civil Practice Law and Rules:

Article 63 3

Section 6313 11

New York Civil Service Law:

Section 211 ..... 10, 11

New York Labor Law:

Section 807 ..... 10, 11, 12

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974.

No. 74-376.

SUSQUEHANNA VALLEY TEACHERS' ASSOCIATION, NEW YORK CONGRESS OF TEACHERS, LYNN H. BLANTON, PATRICK TRACY, MARGARET MULFORD, THOMAS MALLOY, and JAMES C. TRASK,

Petitioners,

v.

CENTRAL SCHOOL DISTRICT NO. 1 OF THE TOWNS OF CONKLIN, BINGHAMTON, KIRKWOOD AND VESTAL, BROOME COUNTY, NEW YORK,

Respondent.

Brief of Petitioners in Reply to Opposing Brief of Respondent Central School District No. 1 of the Towns of Conklin, Binghamton, Kirkwood and Vestal, Broome County, New York.

Statement.

Respondent in its brief in opposition raises several issues that were not directly discussed in petitioners' brief in support of a petition for a writ of certiorari. These issues are discussed herein.

POINT I.

The action of the Appellate Division, Third Department, as a practical matter, did finally determine the action between the parties and is therefore reviewable by this Court under 28 U.S.C. Section 1257(3).

In practical terms, where an illegal public employee job action is alleged by a school district, there is an application made by the employer for a temporary restraining order and a preliminary injunction based on an action for a permanent injunction. Either prior or after the issuance of the preliminary injunction an agreement between the parties is reached, ending the alleged illegal job action. Since the job action is at an end, the underlying action for a permanent injunction is usually discontinued either by stipulation or through lack of further prosecution. Therefore, no strictly "final" order is usually ever entered.

The practical result is that, for all intents and purposes, the preliminary injunction is the most final order that will ever be entered in so-called strike cases. It is therefore unrealistic to believe that a final order based on the action for a permanent injunction will issue from the New York courts. If the courts are unwilling to entertain an appeal based on a preliminary injunction, there will, in effect, be no judicial review available at the highest appellate level. Thus, an appellant will be deprived of having a reviewable final order entered against him and a situation may well exist which is capable of repetition, but which evades judicial review.

Petitioners herein appealed to the New York Appellate Division, Third Judicial Department, from the lower court's order granting a preliminary injunction against petitioners. The appeal was unanimously denied. There

is no question but that petitioners undertook to obtain judicial review of the preliminary injunction granted against them.

Under the New York *Civil Practice Law and Rules*, petitioners next made a motion to the Appellate Division, Third Department, for leave to appeal to the Court of Appeals, New York's highest court. This motion was denied. Finally a motion for leave to appeal was made to the New York Court of Appeals, which also denied appeal.

Respondent at Point I (A) and (B) alleges that petitioners should have proceeded under Article 63 of the *Civil Practice Law and Rules* of New York or sought a final determination of the preliminary injunction. It is submitted, however, that these recourses were *optional.* Instead, exercising their procedural option, petitioners sought review of the preliminary injunction by appeal to the Appellate Division. The appeal was taken in lieu of moving to vacate the order of preliminary injunction, and petitioners believed thereby that the entire order would be reviewed upon appeal. An appeal of an order brings the whole of the order before the court and serves as well as a motion to vacate.

Furthermore, the manner in which the Broome County Supreme Court, Brink, J., granted the preliminary injunction—by bench decision—left no doubt that the action for a permanent injunction would have been successful. Indeed, one of the grounds for granting a preliminary injunction is the likelihood of ultimate success on the merits. The relief requested in the preliminary injunction was in almost all respects identical to that sought in the action for a permanent injunction. There is no requirement that petitioners must undertake to enforce an action for a permanent injunction, where the outcome is not in doubt.

During the hearing on the preliminary injunction, the same witnesses and the same fact patterns were presented to the lower court as would have been presented in the action for a permanent injunction. Therefore in view of the similarity of witnesses and evidence presented, there is no reason to believe that a permanent injunction would not have been granted against petitioners herein.

This Court recognized that it could review a "temporary injunction" in *Organization For a Better Austin v. Keefe*, 402 U. S. 415 (1971), quoted at page 9 of respondent's brief in opposition. Therein this Court stated:

> "Indeed, our reading of the record leads to the conclusion that the issuance of a permanent injunction upon termination of these proceedings will be little more than a formality."

Petitioners submit that the issuance of a permanent injunction in this matter would also be little more than a formality.

Respondents also note at page 9 of their brief in opposition the case of *Bond Stores, Inc., v. Turner*, 262 App. Div. 417, 29 N. Y. S. 2d 82 (3rd Dept. 1941), as stating the law of New York State. It is submitted that that case is not opposed to the case herein presented. In the instant case there has been no attempt to have the merits of the case passed upon by the New York courts, thereby maintaining the *"status quo"* indefinitely. The parties herein have never had their day in court as to the merits, because a permanent injunction has not been and will not be sought.

Amalgamated Food Employees' Union Local 590 v. Logan Valley Plaza, 391 U. S. 308 (1968), cited by respondent at page 9 of its brief in opposition is again illustrative

of the final nature of the preliminary injunction which is before this Court on review. Therein this Court reviewed an injunction without concern of whether it was permanent or temporary because the order provided that it should remain in effect until further modification by the court; and since there was no indication that any modification affecting the issues would be before the court in the near future, the judgment was held to be clearly final for purposes of review. This is exactly the case before the Court here. Finally, the *Amalgamated* case does not stand for the proposition that picketing is constitutionally prohibited, far from it, the case stands for the proposition that although the exercise of First Amendment freedoms, may in certain instances be regulated, they may not be done away with.

Respondent cites with approval, at page 11 of its brief in opposition, *Montgomery Building and Construction Trades Council v. Ledbetter Erection Company, Inc.*, 344 U. S. 178 (1952). This case has clearly been superceded by the *Organization for a Better Austin* case and the *Amalgamated Food Employees'* case. Both of the latter cases permitted court review of a less than permanent injunction. In *Laborer's Local 438 v. Curry*, 371 U. S. 542 (1963), this Court also held that it would review a judgment of a state court with or without a final judgment, where postponing review would seriously erode national labor policy. In the case *sub judice*, there also exists a necessity for determining the instant matter without regard to its "finality." The case herein is representative of many labor cases arising in the State of New York which, save for this Court's review, would be doomed to a shadowy existence unreviewable by the courts in the absence of a final permanent injunction. It has been the experience in the public sector in this State that few, if any, permanent injunctions are ever issued in a public sector labor dispute. The cases wherein a temporary restraining order or pre-

liminary injunction has been issued have usually been concluded with the negotiation of a collective bargaining agreement. Since there is an agreement, the petitioning party, the employer, does not feel the necessity for proceeding to the permanent injunction stage. Therefore without review by this Court, the constitutionality of these injunctions would fall between the procedural cracks and important constitutional questions involving the rights of speech, assembly, and association might never be reviewed.

It is interesting to note that this Court granted certiorari in another labor case involving a temporary injunction, picketing and the First Amendment. See *American Radio Assn. v. Mobile Steamship Assn., Inc.*, No. 73-748; cert. granted 2/25/74, argued 10/16/74. Therefore the mere fact of a temporary injunction need not in and of itself deny petitioners their day in this Court.

POINT II.

The controversy presented herein is not moot, but still in active litigation.

Although respondent makes much of the fact that a contract was entered into between the parties, this is not conclusive evidence of mootness. The action complained of by petitioner is not the failure to bargain or reach agreement, but the constitutionality of a preliminary injunction granted against petitioners, restraining them in the exercise of their constitutional rights of speech, assembly and due process under law. In point of fact, the preliminary injunction has never been withdrawn by respondent, nor has the action for a permanent injunction been discontinued.

Thus there is a tangible danger existing that petitioners' speech or assembly could trigger a motion for contempt with possible criminal penalties. There also exists the chilling effect on First Amendment freedoms that a broad preliminary injunction such as the one in this case engenders. This Court has only recently recognized that the imminence of criminal prosecution may well be a live controversy deserving judicial review. *Steffel v. Thompson,* U. S. , 39 L. Ed. 2d 505 (1974).

The outstanding injunction herein may be invoked by respondent at any time. Due to its broadness it may be employed against both legal and/or illegal speech and action *indiscriminately* (see Petition Appendix F). Thus there is a continuing threat to petitioners' First Amendment rights.

Since the strike is over, there are no grounds for issuing a permanent injunction. Therefore there is no desire upon respondent's part to continue their action. If this Court holds this case moot, the peculiar fact pattern embodied in this case will evade review. This case is not unique because the same pattern is commonly employed in strikes by public employees throughout New York State.

Respondent in its opposing brief cites the case of *DeFunis v. Odegaard,* U. S. , 94 S. Ct. 1704 (1974), for the proposition that the case *sub judice* is moot. It is submitted by petitioners that this is inaccurate. DeFunis was not threatened by an existing injunction which sought to limit his right to speech and assembly. DeFunis was not harmed by the acts of the University of Washington Law School. Herein, petitioners must act under a Damoclean sword. Their very conduct may at any time incur judicial punishment. There is no time period to

this threat—it is present and threatening; it acts to chill petitioners' exercise of their First Amendment freedoms.

POINT III.

Merely because a state may act to enjoin picketing in connection with the alleged violation of a state law does not give either that state or its courts the right to extend injunctive relief in such a manner as to chill the exercise of First Amendment freedoms.

Respondent in its brief in opposition at pages 20-24 cites the cases of *Giboney v. Empire Storage and Ice Co.*, 336 U. S. 490 (1949); *Teamsters Local 695 v. Vogt*, 354 U. S. 284 (1957); *Cox v. Louisiana*, 379 U. S. 536 (1965), and *Adderley v. Florida*, 385 U. S. 39 (1966), to support its proposition that speech and assembly may be enjoined when it is ancillary to and in support of conduct which is proscribed by valid state law. In point of fact, these cases are either inapplicable or inapposite. *Giboney, supra*, involved the application of an anti-restraint of trade law against a labor union. There is no allegation that the instant conduct of petitioners represented an anti-trade restraint. Furthermore, *Giboney, supra*, concerns secondary picketing and boycott. The instant case in no manner suggests this fact pattern. In the *Vogt* case, the picketing enjoined was not picketing incident to a strike, but was picketing by a labor organization which was enjoined because employees of a business refused to join the union. In *Giboney, supra*, the picketing was not for the purpose of gaining recognition status or economic benefits from the employer, but rather to coerce the employer to recognize the union and force the employees to accept the union. This is also not the case here. In point of fact there is no evidence but that the picketing involved herein was informational rather than

coercive. Furthermore, although petitioners herein recognize that picketing may be enjoined in some situations, they argue that picketing *per se* may not be prohibited or subject to overbroad and vague injunctions jeopardizing constitutional rights and failing to satisfy the due process requirements of informing petitioners of the conduct to be proscribed.

In the *Adderley* and *Cox* cases, there was picketing on private property and patrolling and marching in the streets and highways. There is no allegation that the conduct herein was the same as in those cases. Indeed, there is no showing, and there was none made in the courts below, that petitioners' picketing and their exercise of the right to free speech materially aided or affected the strike alleged, or influenced others into observing picket lines, staying out of schools, or supporting the strike herein.

This Court is urged to uphold the cases cited by petitioners in their brief in support of petition for a writ, and to uphold the right of free speech and the right of individuals to picket either as individuals or collectively.

POINT IV.

The temporary restraining order and preliminary injunction granted against petitioners was void under New York law.

Petitioners argued in the courts below that the issuance of the temporary restraining order was void *ab initio* and that therefore it gave no jurisdiction over petitioners. Further petitioners argued that even though the restraints on free speech activity contained in the temporary restraining order were sufficient to declare it a nullity, it was also

procedurally suspect under New York law as well. In addition to being procedurally defective under the Fourteenth Amendment, it appears violative of New York's anti-injunction statute, Section 807 of the Labor Law, which provides in substance that no court or judge shall have jurisdiction to issue any injunction temporary or permanent, in a case involving a labor dispute except after a hearing and findings of certain facts specified in the statute, and may not grant relief prohibiting peaceful picketing [subdivision f(5)] and peaceably assembling [subdivision f(7)].

Section 211 of the *Civil Service Law* directs the chief legal officer of a government involved, in the event of a strike by public employees, to apply to the Supreme Court for an "injunction," which "injunction," in the absence of any further modification, description, or characterization, must be interpreted to be a permanent as opposed to a temporary or preliminary injunction, "Notwithstanding the provisions of section eight-hundred seven of the Labor Law" (Section 211) *Civil Service Law.*

Thus, it would appear that but for the exception provided in Sections 211, 807 of the *Labor Law* would apply to those employees and organizations within the coverage of the Civil Service Law. If this were not so, then there would have been no logical reason for the Legislature to include the exception in Section 211.

An exception to the general rule as expressed in Section 807 of the Labor Law, Section 211 of the Civil Service Law *must be narrowly construed, as a jurisdictional statute and limited in its application* only to applications for permanent injunctions and, conversely, inapplicable to requests for temporary injunctive relief.

That this was the intent of the legislature appears to be abundantly clear by the absence of the exception found in Section 211 in Section 6313 of the *Civil Practice Law and Rules* which forbids the issuance of a temporary restraining order in an action arising out of a labor dispute as defined in Section 807 of the *Labor Law*.

> "§6313. Temporary restraining order.
>
> "(a) Generally. If, on a motion for a preliminary injunction, the plaintiff shall show that immediate and irreparable injury, loss or damages will result unless the defendant is restrained before a hearing can be had, a temporary restraining order may be granted without notice. Upon granting a temporary restraining order, the court shall set the hearing for the preliminary injunction at the earliest possible time. *No temporary restraining order may be granted in an action arising out of a labor dispute as defined in section eight hundred seven of the labor law,* nor against a public officer, board or municipal corporation of the state to restrain the performance of statutory duties * * *." (Italics supplied.)

If the "injunction" referred to in Section 211 of the *Civil Service Law* was meant to include temporary restraining orders, then the legislature would certainly have amended Section 6313 of the *CPLR* to exclude the restraint upon the issuance of a temporary restraining order in labor disputes in the case of labor disputes involving public employees.

Furthermore, Section 807 of the *Labor Law* in no way indicates that it is inapplicable to labor disputes involving public employees.

It is, therefore, submitted that the *ex parte* temporary restraining order herein insofar as it was granted in an

action arising out of a labor dispute was also void as violative of Section 807 of the *Labor Law* of the State of New York.

CONCLUSION.

For the reasons cited in petitioners' petition for a writ of certiorari and those cited herein, this Court should grant certiorari.

Dated: November 18, 1974.

Respectfully submitted,

BERNARD F. ASHE,
Counsel for Petitioners,
80 Wolf Road,
Albany, N. Y. 12205
(518) 459-5400.

JAMES R. SANDNER,
ROCCO A. SOLIMANDO,
IVOR R. MOSKOWITZ,
Of Counsel.